SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No.

MAXINE MURRAY, ON HER OWN BEHALF AND AS GUARDIAN AD LITEM OF MAXINE LOIS MURRAY, MINOR, PETITIONER,

vs.

JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R. W. KALTENBACH CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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[fols. a & b] [Caption omitted]

[fol. 1]

IN SUPERIOR COURT OF KITSAP COUNTY

No. 10433

MAXINE MURRAY, on Her Own Behalf and as Guardian ad Litem of Maxine Lois Murray, a Minor, Plaintiffs,

vs.

JOE GERRICK CO., INDUSTRIAL BROWN HOIST CORPORATION, R. W. Kaltenbach Corporation, F. W. Corning, Irving Gottheim, and Max Bloomenstein, Defendants

COMPLAINT—Filed July 27, 1932

Plaintiffs, for complaint against the defendants, and each of them, allege:

I

That the plaintiff, Maxine Murray, is the widow of Louis Henry Murray, the decedent hereinafter mentioned, and the guardian ad litem of Maxine Lois Murray, a minor, the daughter of the said Louis Henry Murray, deceased, and the plaintiff, Maxine Murray, and brings this action for and on behalf of herself and their said minor child.

II

That the defendant, Joe Gerrick & Co., is a corporation organized under the laws of the State of California and doing and transacting business at Seattle and Bremerton, Washington; that the defendant, Industrial Brown Hoist Corporation, is a corporation organized under the laws of the State of Michigan, doing and transacting business at Seattle and Bremerton, Washington; and that the defendant, R. W. Kaltenbach Corporation, is a corporation organized under the laws of the State of Ohio, doing and transacting business at Seattle and Bremerton, Washington.

[fol. 2]

III

That at Seattle, Washington, on or about the 17th day of June, 1932, Louis Henry Murray entered into the employment of the defendants in the capacity of a constructural steel worker and commenced to work upon a 20-ton steel tower traveling crane within the Puget Sound Navy Yard at Bremerton, Washington, and while so engaged, at about the hour of 11:30 a. m. on June 21st, 1932, fell from said steel crane a distance of about 25 feet, fracturing and crushing his skull and otherwise seriously damaging and injuring his body, from which injuries he died at Bremerton, Washington on the 22nd day of June, 1932, leaving the plaintiff, Maxine Murray, his widow, and the plaintiff, Maxine Lois Murray, his only child, a minor, 3 years of age, surviving.

IV

That the injuries sustained by the said Louis Henry Murray, and from which he died as aforesaid, were caused solely by and through the carelessness and negligence of said defendants, and each of them, as follows:

(a) That the defendants, and each of them, carelessly and negligently failed and neglected to provide the said Louis Henry Murray with a reasonable safe place in which to work and to perform his work at the time at which he was injured and killed, as aforesaid, and as required by Sections 3515-2-3-4 Pierce's Code of the Laws of the State of Washington, which read:

"Sec. 3515-2. 'Place of Work' Defined.—The phrase 'place of work' shall mean and include every place, whether indoors or out, or underground or elsewhere, and the premises appurtenant thereto, where either temporarily or permanently any industry, trade or business is carried on, or where any process or operation directly or indirectly relating to any industry, trade, work or business is carried on, including all construction work."

"Sec. 3515-3. 'Safety,' etc., Defined.—The terms 'safe' and 'safety', as applied to an employment or place of work; 'safeguard' or 'safety device' shall mean such freedom [fol. 3] from danger to the life or safety of workmen as the nature of the case will reasonably permit; and the two latter

terms shall be given a broad interpretation so as to include any reasonably practical method of mitigating or preventing danger."

"Sec. 3513-4. Duty of Employer.—For the purposes of this act, it shall be the duty of every employer to furnish a place of work which shall be as safe for workmen therein as may be reasonable and practicable under the circumstances, surroundings and conditions, and to furnish and to use such safety devices and safeguards and to adopt and use such practices, means, methods, operations and processes as under the circumstances, surroundings and conditions are reasonable and practical in order to render the work and place of work safe, and to comply with such standards of safety of place of work and such safety devices and safeguards and such standards and systems of education for safety as shall be from time to time prescribed for such employer by the State Safety Board, or by statute, or by the State Mining Board."

or at all.

(b) That the defendants, and each of them carelessly and negligently failed and neglected to provide, furnish, or use any safety device, or to adopt and use the same as required by said statutes, and failed and neglected to adopt and use such practices, means and methods or operation and processes as under the circumstances, surroundings and conditions as were reasonable and practical in order to render the work and place of work safe, as required by said statutes, or at all.

(c) That the defendants, and each of them, carelessly and negligently allowed and permitted pieces of loosely coiled rope and other debris to lie and remain upon the steel structural beams upon which the said decedent was required to go, walk, and work while performing his work upon said crane.

(d) That the defendants, and each of them, carelessly and negligently caused the structural steel beams and parts of said crane to be heavily covered and painted with red greasy oil lead, making the steel used in the construction of said crane, and upon which said Louis Henry Murray

was required to work, slippery, dangerous and difficult to [fol. 4] hold onto and stand on when working thereon.

(e) That the defendants, and each of them, carelessly and negligently failed to furnish and provide a fit, safe or suitable platform with a railing thereon under, adjacent or close up to where the plaintiff was required to perform his work while "bucking-up" (placing, driving and fastening the rivets through and joining the steel beams and parts of said crane together) so that in case the said Louis Henry Murray lost his balance or hold, or happened to slip or miss his footing while engaged in his work, he could catch hold thereof, step upon or fall upon and thus save himself from falling to the ground, as aforesaid.

(f) That it was the duty of the defendants, and each of them, to furnish and provide a safe and suitable platform of sufficient width, with lines, railing, or other device thereon, for the said Louis Henry Murray to stand upon while performing his work upon said crane at a distance of about 25 feet from the ground, so as to prevent him from falling therefrom; and it was their further duty to direct that said platform be available for use while the said Louis Henry Murray was so working, which said duties the defendants, and each of them, carelessly neglected to do and perform.

(g) That while the said Louis Henry Murray was going about and performing his work upon said crane, as aforesaid, in a cautious and careful manner, he reached for an iron bar with which to hold against a rivet as it was being riveted in place, and while so doing, slipped from a flange on a steel beam on which he was working, and, in attempting to grasp a hold of said beam, he was prevented from so doing by a loose coil of rope lying on top thereof, and, as he fell, he endeavored to grasp ahold of said platform in order to save himself from falling to the ground, but that on account of the same being narrow and carelessly and negligently placed close in to the side of the frame of said [fol. 5] crane at a distance of about 5 feet below where the said Louis Henry Murray was required to work and was without any railing or line thereon to grab hold of, he was unable to grasp the same and was unable to save himself thereby from falling to the ground (a distance of about 25

feet) and sustaining the injuries from which he died, as aforesaid, all on account of the carelessness and negligence of the defendants, and each of them, as aforesaid.

(h) That had said defendants furnished a safe and suitable platform for the said Louis Henry Murray to stand upon in performing his work upon said crane, with the lines, railing or other device thereon so as to protect and prevent the said Louis Henry Murray from falling to the ground while engaged at his work, as required by the aforesaid provisions of the laws of the State of Washington, the said Louis Henry Murray would not have fallen to the ground and been killed, as aforesaid.

V

That at the time of the death of the said Louis Henry Murray he was a strong, young, healthy, active man, 30 years of age, with a reasonable life expectancy of 35.33 years, as shown by the American Mortality Tables, a skilled steel constructural worker, earning and capable of earning a wage of $8.80 per day, of 8 hours, and in normal times of obtaining almost constant employment, and of continuing to earn said sum of $8.80 per day or more for the full period of 35.33 years. That from the time the said Louis Henry Murray fell until the time of his death he suffered extreme and excruciating pain and agony.

VI

That the said Louis Henry Murray left surviving his widow, the plaintiff, Maxine Murray, and the plaintiff, Maxine Lois Murray, 3 years of age, who were wholly dependent upon the earnings of the said Louis Henry Murray for [fol. 5½] their livelihood, and that by his death they have lost their sole means of support and maintenance, his further earnings, accumulations, his foresight and management, and have been deprived of his love, comfort, society, advice, counsel and foresight as a husband and father, and that the plaintiff, in her own right and as guardian ad litem for the said Maxine Lois Murray, have been injured, damaged and sustained a loss in the premises by reason of the carelessness and negligence of the defendants, and each of them, as herein alleged, in the full sum of $27,500.

Wherefore plaintiffs demand judgment against the defendants, and each of them, in the full sum of $27,500, together with their costs and disbursements of this action.

Wm. Martin, Attorney for Plaintiff.

Duly sworn to by Maxine Murray. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 6] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

ORDER APPOINTING MAXINE MURRAY GUARDIAN AD LITEM OF MAXINE LOIS MURRAY—Filed July 17, 1932

This cause coming on for hearing upon the application of Maxine Murray for an order apointing the plaintiff Maxine Murray guardian al litem of the plaintiff Maxine Lois Murray, and it appearing to the Court that the above entitled action is brought by the plaintiff to recover damages from the defendants for alleged negligence causing the death of Louis Henry Murray, the husband of the plaintiff Maxine Murray and the father of said Maxine Lois Murray, and that it is necessary that a guardian be appointed for the purpose of carrying on said action; that Maxine Lois Murray is a minor three years of age and that her mother Maxine Murray, the plaintiff herein, is a fit and proper person to be appointed guardian ad litem for the said Maxine Lois Murray for such purpose.

It is therefore ordered, considered, and decreed that Maxine Murray, the plaintiff, be and she is hereby appointed guardian ad litem of the plaintiff Maxine Lois Murray, a minor, for all purposes of this action, with full authority and power to prosecute such action against the defendant for and on behalf of the said Maxine Lois Murray.

Done in Open Court this 27 day July, 1923.

H. G. Sutton, Judge.

Presented by—

Wm. Martin, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 7] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

MOTION TO STRIKE—Filed Sept. 2, 1932

Comes now the defendant, Industrial Brown Hoist Corporation, and moves against the complaint herein as foldows:

I

Referring to paragraph IV of the complaint, this defendant moves that the court strike therefrom all of subdivision (a), and each and every part thereof, upon the ground and for the reason that the same is irrelevant, immaterial and has no application whatsoever to the cause of action sought to be alleged in said complaint.

II

Referring to said paragraph IV, this defendant further moves to strike subdivision (b) thereof, and each and every part of said subdivision, upon the ground and for the reason that the same constitutes solely a conclusion of law, and is not an allegation of any fact, and upon the further ground that the same is irrelevant and immaterial and not applicable to the cause of action sought to be alleged in said complaint.

III

In the alternative, and only in the event the foregoing motion II is denied, this defendant further moves that the court require the plaintiff to make said subdivision more [fol. 8] definite and certain by stating therein and specifying particularly the safety device, practices, means, methods and/or processes which the defendants are alleged to have failed and neglected to provide, furnish, adopt or use, or in the alternative to furnish said particulars and specifications by way of a bill of particulars.

IV

Referring to subdivision (h) of said paragraph IV, and particularly that portion thereof as follows;

"as required by the aforesaid provisions of the laws of the State of Washington,"

that the same be stricken upon the ground and for the reason that the same is irrelevant, immaterial, not applicable

to the cause of action sought to be alleged herein and is a mere conclusion of law.

J. Speed Smith & Henry Elliott, Jr., Attorneys for Defendant Industrial Brown Hoist Corporation, 412 Dexter Horton Building, Seattle, Washington.

Copy of foregoing received August 31, 1932.
Wm. Martin, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 9] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

DEMURRER—Filed Sept. 2, 1932

Comes now the defendant, Industrial Brown Hoist Corporation, and demurs to the complaint of the plaintiffs upon the grounds and for the reasons:

I

That the court has no jurisdiction of this action.

II

That neither of the plaintiffs has any legal capacity to sue.

III

That there is a defect of parties plaintiff.

IV

That the complaint does not state facts sufficient to constitute a cause of action against this defendant.

V

That there is a defect of parties defendant.

J. Speed Smith & Henry Elliott, Jr., Attorneys for Defendant Industrial Brown Hoist Corporation, 412 Dexter Horton Building, Seattle, Washington.

Copy of foregoing received August 31, 1932.
Wm. Martin, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 10] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

MOTION TO STRIKE—Filed Sept. 3, 1932

Comes now the defendant, R. W. Kaltenbach Corporation, and moves against the complaint herein as follows:

I

Referring to paragraph IV of the complaint, this defendant moves that the court strike therefrom all of the subdivision (a), and each and every part thereof, upon the ground and for the reason that the same is irrelevant, immaterial and has no application whatsoever to the cause of action sought to be alleged in said complaint.

II

Referring to said paragraph IV this defendant further moves to strike subdivision (b) thereof, and each and every part of said subdivision, upon the ground and for the reason that the same constitutes solely a conclusion of law, and is not an allegation of any fact, and upon the further ground that the same is irrelevant and immaterial and not applicable to the cause of action sought to be alleged in said complaint.

III

In the alternative, and only in the event the foregoing motion II is denied, this defendant further moves that the court require the plaintiff to make said subdivision more definite and certain by stating therein and specifying particularly the safety device, practices, means, methods and/or processes which the defendants are alleged to have failed and neglected to provide, furnish, adopt or use, or in the alternative to furnish said particulars and specifications by way of a bill of particulars.

IV

Referring to subdivision (h) of said paragraph IV, and particularly that portion thereof as follows:

"as required by the aforesaid provisions of the laws of the State of Washington,"

that the same be stricken upon the ground and for the reason that the same is irrelevant, immaterial, not applicable to the cause of action sought to be alleged herein and is a mere conclusion of law.

J. Speed Smith & Henry Elliott, Jr., Attorneys for
[fol. 11] Defendant R. W. Kaltenbach Corporation,
412 Dexter Horton Building, Seattle, Washington.

Copy of foregoing received August 31, 1932.
Wm. Martin, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 12] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

DEMURRER—Filed Sept. 2, 1932

Comes now the defendants, R. W. Kaltenbach Corporation, and demurs to the complaint of the plaintiffs upon the grounds and for the reasons:

I

That the court has no jurisdiction of this action.

II

That neither of the plaintiffs has any legal capacity to sue.

III

That there is a defect of parties plaintiff.

IV

That the complaint does not state facts sufficient to constitute a cause of action against this defendant.

V

That there is a defect of parties defendant.

J. Speed Smith & Henry Elliott, Jr., Attorneys for
Defendant R. W. Kaltenbach Corporation, 412
Dexter Horton Building, Seattle, Washington.

Copy of foregoing received August 31, 1932.
Wm. Martin, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 13] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

ORDER SUSTAINING DEMURRER—Filed Sept. 21, 1932

This cause coming on duly and regularly for hearing upon the motions and demurrers presented upon behalf of the several defendants herein, and the court having heard the argument of counsel for said defendants respectively, and of counsel for the plaintiffs, and being fully advised, it is now by the court

Ordered and adjudged that said demurrers, and each of them, be and hereby are sustained, and that said motions, and each of them, be and hereby are granted, to which rulings, and each of them, the plaintiffs except and said exceptions be and hereby are allowed; and it is further

Ordered and adjudged that the plaintiffs have ten days from the date hereof to plead further.

Done in open court this 21 day of September, 1932.

H. G. Sutton, Judge.

O. K. as to form.

Wm. Martin, Attorneys for Plaintiffs.

Presented by—

Chas. L. Conley, Attorney for Defendants.

[File endorsement omitted.]

[fol. 14] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

AMENDED COMPLAINT—Filed Sept. 27, 1932

Plaintiffs for complaint against the defendants and each of them allege:

I

That the plaintiff, Maxine Murray, is the widow of Louis Henry Murray, the decedent hereinafter mentioned, and the guardian ad litem of Maxine Lois Murray, a minor, the daughter of the said Louis Henry Murray, deceased, and

the plaintiff Maxine Murray, and brings this action for and on behalf of herself and their said minor child.

II

That the defendant Joe Gerrick & Company is a corporation organized under the laws of the State of California and doing and transacting business at Seattle and Bremerton, Washington; that the defendant Industrial Brown Hoist Corporation is a corporation organized under the laws of the State of Michigan, doing and transacting business at Seattle and Bremerton, Washington; and that the defendant R. W. Kaltenbach Corporation is a corporation organized under the laws of the State of Ohio, doing and transacting business at Seattle and Bremerton, Washington.

[fol. 15]

III

That on or about the 1st day of October, 1931 the defendant R. W. Kaltenbach Corporation entered into a contract with the United States of America through the Chief of the Bureau of Yards & Docks, acting under the direction of the Secretary of the Navy, for the construction of a 20-ton traveling steel tower crane at the Puget Sound Navy Yard at Bremerton, Washington, under the terms and conditions of which the said R. W. Kaltenbach Corporation was to provide all the work, labor and materials used upon and in the construction of said crane and deliver the same complete within the Navy Yard on or before the 30th day of July, 1932 for the sum of Fifty Five Thousand Dollars ($55,000).

IV

That said contract containing all the terms and conditions, drawing and specifications for the construction of said crane as aforesaid is within the possession of the defendants, and the plaintiff is therefore unable to further describe the same other than that one of the terms and conditions of said contract provided:

"The contractor (that is, the defendant R. W. Kaltenbach Corporation) shall give his personal superintendence to the work or have a competent foreman or superintend-

ent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him."

V

That the defendant R. W. Kaltenbach Corporation employed, hired and contracted with the defendant Industrial Brown Hoist Corporation to furnish the work, labor and materials used in the construction of said crane, and the defendant Industrial Brown Hoist Corporation employed, hired and contracted with the defendant Joe Gerrick & Company to hire and employ the said Louis Henry Murray to work upon and in the construction of said crane as a structural steel worker for said defendant corporations, and who was at all times under the supervision, direction and orders of each of them.

[fol. 16]

VI

That the defendant corporations and each of them in the construction of said 20-ton tower crane as aforesaid employed the defendant Max Bloomenstein and the defendant F. W. Corning as their superintendents and foremen and who were in charge thereof as vice-principals of each of the defendant companies, and who then and there were in charge of and supervising the construction of said tower crane, and under whose orders and directions Louis Henry Murray herein mentioned was.

VII

That at Seattle, Washington, on or about the 17th day of June, 1932 Louis Henry Murray entered into the employment of the defendants as a structural steel worker at a wage of $1.10 per hour, time to start when he left Seattle and to continue until he returned; and on said date commenced to work for the defendants upon said 20-ton steel tower traveling crane within the Puget Sound Navy Yard at Bremerton, Washington; and, while so engaged, at about the hour of 11:30 a. m. on June 21, 1932, fell from said steel crane a distance of about 25 feet, fracturing and crushing his skull and otherwise seriously damaging and injuring his body, from which injuries he died at Bremerton, Washington on the 22nd day of June, 1932, leaving the plaintiff Maxine Murray, his widow, and the plaintiff

Maxine Lois Murray, his only child, a minor three years of age, surviving.

VIII

That the injuries sustained by the said Louis Henry Murray, and from which he died as aforesaid, were caused solely by and through the carelessness and negligence of said defendants and each of them as follows:

(a) That the defendants and each of them carelessly and negligently failed and neglected to provide the said [fol. 17] Louis Henry Murray with a reasonably safe place in which to work and to perform his work at the time at which he was injured and killed as aforesaid, and as required by Sections 3515-2-3-4 Pierce's Code of the Laws of the State of Washington, which read:

"Sec. 3515-2. 'Place of Work' Defined.—The phrase 'place of work' shall mean and include every place, whether indoors or out, or underground or elsewhere, and the premises appurtenant thereto, where either temporarily or permanently any industry, trade or business is carried on, or where any process or operation directly or indirectly relating to any industry, trade, work or business is carried on, including all construction work."

"Sec. 3515-3. 'Safety,' etc., Defined.—The terms 'safe' and 'safety,' as applied to an employment or place of work; 'safeguard' or 'safety device' shall mean such freedom from danger to the life or safety of workmen as the nature of the case will reasonably permit; and the two latter terms shall be given a broad interpretation so as to include any reasonable practical method of mitigating or preventing danger."

"Sec. 3515-4. Duty of Employer.—For the purposes of this act, it shall be the duty of every employer to furnish a place of work which shall be as safe for workmen therein as may be reasonable and practicable under the circumstances, surroundings and conditions, and to furnish and use such safety devices and safeguards and to adopt and use such practices, means, methods, operations and processes as under the circumstances, surroundings and conditions are reasonable and practical in order to render the work and place of work safe, and to comply with such

standards of safety of place of work and such safety devices and safeguards and such standards and systems of education for safety as shall be from time to time prescribed for such employer by the State Safety Board, or by statute, or by the State Mining Board."

or at all.

(b) That the defendants and each of them carelessly and negligently failed and neglected to provide, furnish or use any safety device, or to adopt and use the same as required by said statutes, and failed and neglected to adopt and use such practices, means and methods or operation and processes as under the circumstances, surroundings and condition were reasonable and practical in order to render the work and place of work safe, as required by said statutes, or at all.

[fol. 18] (c) That the defendants and each of them carelessly and negligently allowed and permitted pieces of loosely coiled rope and other debris to lay and remain upon the steel structural beams upon which the said decedent was required to go, walk, and work while performing his work upon said crane.

(d) That the defendants and each of them carelessly and negligently caused the structual steel beams and parts of said crane to be heavily covered and painted with red, greasy oil lead, making the steel used in the construction of said crane and upon which said Louis Henry Murray was required to work slippery, dangerous and difficult to hold onto and stand on when working thereon.

(e) That the defendants and each of them carelessly and negligently failed to furnish and provide a fit, safe and suitable platform with a railing, rope or any other device around the same so as to prevent the said Louis Henry Murray from falling therefrom, off or over the same while working on the construction of said crane, and carelessly and negligently failed and neglected to provide a platform constructed as aforesaid close up to, under and adjacent to where the decedent was required to perform his work while "bucking up" (placing, driving and fastening the rivets through and joining the steel beams and parts of said crane together), and on which the said Louis Henry Murray while

so working could stand in the performance of the work which he was required to do; so that in case the said Louis Henry Murray lost his balance or hold while working as aforesaid or happened to slip or lose his footing while engaged in his work, he could catch hold thereof, step upon or fall upon and thus save himself from falling to the ground as aforesaid.

(f) That it was the duty of the defendants and each of them to furnish and provide a safe and suitable platform of sufficient width, with lines, railing, or other device thereon, for the said Louis Henry Murray to stand upon while performing his work upon said crane at a distance of about 25 [fol. 19] feet from the ground, so as to prevent him from falling therefrom; and it was their further duty to direct that said platform be available for use while the said Louis Henry Murray was so working, which said duties the defendants and each of them carelessly and negligently failed and neglected to do and perform.

(g) That while the said Louis Henry Murray was going about and performing his work upon said crane, as aforesaid, in a cautious and careful manner, he reached for an iron bar with which to hold against a rivet as it was being riveted in place, and while so doing slipped from a flange on a steel beam on which he was working and, in attempting to grasp ahold of said beam, he was prevented from so doing by a loose coil of rope lying on top thereof, and as he fell he endeavored to grasp ahold of said platform in order to save himself from falling to the ground, but on account of the same being narrow and carelessly and negligently placed close in to the side of the frame of said crane at a distance of about 5 feet below where the said Louis Henry Murray was required to work and was without any railing or line thereon to grab hold of, he was unable to grasp the same and was unable to save himself thereby from falling to the ground (a distance of about 25 feet) and sustaining the injuries from which he died, as aforesaid; all on account of the carelessness and negligence of the defendants and each of them as aforesaid.

(h) That said platform provided by the defendants and each of them as aforesaid was what is known as a hanging platform, and was too heavy and could not be raised or

lowered with the falls provided therefor by the defendants without very great difficulty; and that the defendants and each of them were further guilty of carelessness and negligence in not providing falls with sufficient purchase and with a platform of proper weight so that the platform could [fol. 20] be raised or lowered readily and conveniently by the said Louis Henry Murray and the other workmen when necessary in carrying on their work in constructing and erecting said crane as aforesaid.

(i) That had said defendants furnished a safe and suitable platform for the said Louis Henry Murray to stand upon in performing his work upon said crane, with the lines, railing or other device thereon so as to protect and prevent the said Louis Henry Murray from falling to the ground while engaged at his work, the said Louis Henry Murray would not have fallen to the ground and been killed as aforesaid.

IX

That the work in which the said Louis Henry Murray was engaged upon and in constructing said tower crane was extra-hazardous work and known to be such by the defendants and each of them at the time at which they employed the said Louis Henry Murray to work thereon as aforesaid.

X

That neither of the defendants did, before so commencing work on the construction of said tower crane, notify the Director of Labor & Industries of such fact and accompany such notification with an estimate of its payroll for the first calendar month of its proposed operations and make payment of the premium on such estimated payroll; and that each of the defendants failed to furnish, on or before the 15th of each month while said work of constructing said tower crane was in progress, a true and accurate payroll or any payroll showing the aggregate number of work days (that is men-days) during which workmen were employed by each of the defendants during the preceding calendar month, the total amount paid to such workmen during such preceding calendar month, and a segregation of employment in the different classes, and failed to pay its premium thereon or any part thereof to the accident fund and medi-

cal aid fund of the Industrial Insurance Department of the State of Washington or at all.

[fol. 21]

XI

That while the defendants and each of them were in default as aforesaid and were all while engaged in this state in carrying on said extra-hazardous work of building and constructing said 20-ton steel tower traveling crane as aforesaid, the said Louis Henry Murray fell therefrom while working thereon and was injured and killed as aforesaid, leaving the plaintiffs, Maxine Murray and Maxine Lois Murray, his sole beneficiaries and dependents, and who are prosecuting this action as such to recover therefor.

XII

That at the time of the death of the said Louis Henry Murray, he was a strong, young, healthy, active man, thirty (30) years of age, with a reasonable life expectancy of 35.33 years as shown by the American Mortality Tables, a skilled steel constructural worker earning and capable of earning a wage of $8.80 per day of 8 hours, and in normal times of obtaining almost constant employment and would have been able to continue to earn said sum of $8.80 per day or more for the full period of said 35.33 years. That, from the time the said Louis Henry Murray fell and was injured until the time of his death, he suffered extreme and excruciating pain and agony.

XIII

That the said Louis Henry Murray left surviving his widow, the plaintiff Maxine Murray, and the plaintiff Maxine Lois Murray, three (3) years of age, who were wholly dependent upon the earnings of the said Louis Henry Murray for their livelihood, and that by his death they have lost their sole means of support and maintenance, his further earnings, accumulations, his foresight and management, and have been deprived of his love, comfort, society, advice, counsel and foresight as a husband and father, and that the plaintiff Maxine Murray, in her own right and as [fol. 21a] guardian ad litem for the said Maxine Lois Murray, has been injured, damaged and sustained a loss in

the premises by reason of the carelessness and negligence of the defendants and each of them as herein alleged in the full sum of Twenty Seven Thousand Five Hundred Dollars ($27,500), no part of which has been paid although frequently demanded.

Wherefore plaintiffs demand judgment against the defendants and each of them in the full sum of Twenty Seven Thousand Five Hundred Dollars ($27,500), together with their costs and disbursements of this action.

Wm. Martin, Attorney for Plaintiffs.

Duly sworn to by Maxine Murray. Jurat omitted in printing.

[fol. 21b] Copy of foregoing Amended Complaint received this 26th day of September, 1932.

J. Speed Smith & Henry Elliott, Jr., Attorneys for Defendants Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation, and Max Bloomenstein. Stephen O. Carey, Attorney for Joe Gerrick & Co. and F. W. Corning, Defendants.

[File endorsement omitted.]

[fol. 22] In Superior Court of Kitsap County

[Title omitted]

Demurrer—Filed Oct. 4, 1932

Come now the defendants, Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation and Max Bloomenstein and demur to the amended complaint of the plaintiffs upon the grounds and for the reasons:

I

That the court has no jurisdiction of this action.

II

That neither of the plaintiffs has any legal capacity to sue.

III

That there is a defect of parties plaintiff.

IV

That the complaint does not state facts sufficient to constitute a cause of action against these defendants.

V

That there is a defect of parties defendant.

VI

That separate causes of action have been improperly joined in said amended complaint.

J. Speed Smith & Henry Elliott, Jr., Attorneys for Defendants, Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation, and Max Bloomenstein, 412 Dexter Horton Building, Seattle, Wash.

Copy of foregoing received October 3, 1932.
Wm. Martin, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 23] In Superior Court of Kitsap County

[Title omitted]

Demurrer—Filed Oct. 8, 1932

Come now the defendants, Joe Gerrick & Company and F. W. Corning, and demur to the amended complaint of the plaintiffs upon the grounds and for the reasons:

I

That the court has no jurisdiction of this action.

II

That neither of the plaintiffs has any legal capacity to sue.

III

That there is a defect of parties plaintiff.

IV

That the complaint does not state facts sufficient to constitute a cause of action against these defendants.

V

That there is a defect of parties defendant.

VI

That separate causes of action have been improperly joined in said amended complaint.

Stephen V. Carey, Attorney for Defendants Joe Gerrick & Company and F. W. Corning.

Copy received this 4th day of October, 1932.
Wm. Martin, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 24] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

MEMORANDUM OPINION—Filed Nov. 16, 1932

After reading the briefs of counsel and the cases cited, I am convinced that the case of State ex rel. Grays Harbor Construction Company v. Department of Labor and Industries, 67 Wash. Dec. 408, is decisive of the facts here pleaded. From the reasoning in that case necessarily follows the corollary that had the United States assumed full control and jurisdiction over the Rainier National Park prior to the passage of the Workmen's Compensation law, the case would have been decided adversely. Since it appears an unquestioned fact in this case that the Federal Government did acquire full control over the Bremerton Navy Yard prior to the passage of the Act, it follows that the Act can not and does not apply. Therefore the demur-

rer will be sustained. Furthermore, I can not see that the federal statute passed by Congress in 1928 has any reference whatever to the Workmen's Compensation Acts of the various states. Its language precludes any such opinion.

There remains only the question of what right of action, if any, arises from the wrongful death of Murray, and who is the proper party to maintain it. Even without the Federal Act of 1928 there would still be a right of action for the wrongful death of Murray, under the laws of this state passed many years ago. Originally that right was enforced by the persons directly interested, such as the wife and chil-
[fol. 25] dren, but in 1917 the legislature provided that such an action must be brought by the personal representative of the deceased, and a number of reasons supporting the wisdom of this amendment occur to me. The Federal Act of 1928 preserved this right as it then existed in this state. Therefore, under the Court's view of the matter, only the personal representative of the deceased, Murray, has a right to bring an action in the state courts based upon any negligence of the defendants.

The demurrer to the complaint must therefore be sustained on two grounds: First, it does not state a cause of action under the Workmen's Compensation Act because this Act does not apply; second, there is a defect of parties plaintiff on any cause of action that is attempted to be stated on the ground of negligence.

H. G. Sutton, Judge.

Dated this 16th day of November, 1932.

[File endorsement omitted.]

[fol. 26] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

JUDGMENT—Filed Nov. 22, 1932

This cause came on for hearing before the Honorable H. G. Sutton, Judge, upon the demurrer of the defendants to plaintiffs' amended complaint. William Martin, Esq., attorney, appeared for plaintiffs; Stephen V. Carey, Esq., and Roy E. Bigham, Esq., Attorneys, appeared for the de-

fendants Joe Gerrick & Company and F. W. Corning; and J. Speed Smith, Esq., and Henry Elliott, Jr., Esq., attorneys, appeared for the defendants Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation, and Max Bloomenstein. The demurrer was argued and submitted to the Court upon briefs of the respective parties. After due consideration of the same, the Court rendered and filed its memorandum opinion thereon sustaining defendants' demurrer upon the grounds and for the reasons stated in its memorandum opinion, to which objections and exceptions were duly taken by the plaintiffs to each and every of the Court's rulings therein, which exceptions were duly allowed.

Thereupon the plaintiffs announced that they elected to stand upon their amended complaint and refused to plead further. Whereupon defendants moved for the dismissal of the plaintiffs' complaint, which motion was by the Court granted, to which plaintiffs excepted and their exceptions were allowed.

It is therefore, on motion of defendants, ordered that judgment be entered in accordance therewith.

[fol. 26½] Wherefore it is hereby ordered, considered, and decreed that the above entitled action be and the same is hereby dismissed with costs to defendants, to which plaintiffs except and their exception is allowed.

Done in Open Court this 22 day of November, 1932.

H. G. Sutton, Judge.

O. K. as to form.
Stephen V. Carey & R. E. Bigham, Atty. for Joe Gerrick & Co. and F. W. Corning.

O. K. as to form.
J. Speed Smith & Henry Elliott, Jr., Attorneys for Brown Hoist Corp., R. W. Kaltenbach Corporation, and Max Bloomenstein.

[File endorsement omitted.]

[fol. 27] IN SUPERIOR COURT OF KITSAN COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed Nov. 25, 1932

To the above-named defendants, Joe Gerrick & Company and F. W. Corning, and to their attorneys, Stephen V. Carey, Esq., and Roy E. Bigham, Esq.:

To the above-named defendants, Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation, and Max Bloomenstein, and to their attorneys, J. Speed Smith, Esq., and Henry Elliott, Jr., Esq.:

You and each of you will please take notice that the plaintiffs, Maxine Murray on her own behalf and as Guardian Ad Litem of Maxine Lois Murray, a minor, feeling aggrieved at the judgment entered in the above numbered and entitled action and court by the Hon. H. G. Sutton, Judge, signed and filed with the clerk on the 22nd day of November, 1932, in favor of the defendants and against the plaintiffs, do hereby appeal from each and every part of said judgment and decree and all rulings, orders, findings, conclusions, steps and proceedings had in said cause to the Supreme Court of the State of Washington.

Dated this 23rd day of November, 1932.

Wm. Martin, Attorney for Plaintiffs.

We hereby acknowledge receipt of a copy of the foregoing notice of Appeal this 23rd day of November, 1932.

Stephen V. Carey, Attorneys for Joe Gerrick & Company and F. W. Corning, Defendants. J. Speed Smith & Henry Elliott, Jr., Attorneys for Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation, and Max Bloomenstein, Defendants.

[File endorsement omitted.]

[fols. 28 & 29] Bond on appeal for $200, approved and filed November 25, 1932, omitted in printing.

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 31] IN SUPREME COURT OF WASHINGTON, DEPARTMENT TWO

No. 24301

MAXINE MURRAY, on Her Own Behalf and as Guardian ad Litem of Maxine Lois Murray, a Minor, Appellants,

v.

JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R. W. Kaltenbach Corporation, F. W. Corning, Irving Gottheim, and Max Bloomenstein, Respondents

OPINION—Filed March 24, 1933

This action was brought to recover damages for wrongful death. To the complaint a demurrer was interposed and sustained. An amended complaint was filed and a demurer to that was likewise interposed and sustained. The plaintiff elected to stand upon the amended complaint and refused to plead further. Judgment was entered dismissing the action, from which she appeals.

The facts, as stated in the amended complaint, so far as they are necessary to present the questions here for determination, may be summarized as follows: On or about October 1, 1931, the respondent R. W. Kaltenbach Corporation entered into a contract with the United States Government for the construction of a twenty ton traveling steel tower crane at the Puget Sound Navy Yard at Bremerton, this state. The Kaltenbach corporation contracted with the Industrial Brown Hoist Corporation to furnish the work, labor and materials used in the construction of the crane. Louis Henry Murray was employed to work upon, and in the construction of, the crane as a structural steel worker.

On or about June 17, 1932, Murray entered into the [fol. 32] employment as such steel worker at a wage of $1.10 per hour; the time to start when he left Seattle where the contract of employment was made, and the time was to continue until he returned there. Murray began the work for which he was employed, and while so engaged on June 21, 1932, he fell from the steel crane a distance of about twenty-five feet and sustained injuries from which

he died within a day or two thereafter, leaving the appellant Maxine Murray, his widow, and Maxine Lois Murray, his only child, a minor three years of age, surviving.

Negligence is charged in a number of particulars, and it is further alleged that the work in which Murray was engaged was extra-hazardous. The employers of Murray had not paid to the state director of labor and industries the premium upon its estimated payroll. By the allegations of the amended complaint, it is sought to state a cause of action under the industrial insurance law of this state where the employer has not given notice to the department of labor and industries and paid the premiums upon his estimated payroll.

The industrial insurance act of this state (laws of 1911, chapter 74) was passed a number of years subsequent to the time this state, by legislative enactment, gave its consent to the acquisition of the Puget Sound Navy Yard by the Federal government and ceded exclusive jurisdiction thereto.

The first question to be determined is whether the industrial insurance act extends over the navy yard, which is subject to the jurisdiction of the Federal government.

In State ex rel. Grays Harbor Construction Co. v. Department of Labor & Industries, 167 Wash. 507, 10 P. (2d) 213, it was held that exclusive Federal jurisdiction over Rainier National Park having been acquired through con- [fol. 33] sent of the state subsequent to the passage of the state industrial insurance act, which was in force within the boundaries of the park at the time jurisdiction was ceded, the act remained in force as to private rights within the park until such time as Congress passed an act which superseded it. In the course of the opinion, it was said:

"Prior to the time that the governor of this state was so notified, and in the year 1911, the workmen's compensation act was passed. At that time, the cession of the jurisdiction over the park area to the Federal government had not become effective, and did not become effective until approximately five years later. The Federal jurisdiction over the park area not having become effective when the workmen's compensation act was passed, that act was in force and operative within the boundaries of the park. The workmen's compensation act having been passed be-

fore the cession of the jurisdiction over the park area became effective, it remained in force in the ceded territory until displaced by Congress. [Citing authorities.]"

From the holding in that case, it necessarily follows that the jurisdiction of the Federal government over the navy yard having become effective by consent of the state prior to the passage of the industrial insurance act, that act would not extend to the navy yard unless the Federal Congress should pass an act which would so extend it; and it is contended that this is what Congress has done.

In 1928, Congress passed an act (United States Statutes at Large, Vol. 45, Part 1, p. 54) the title of which was as follows:

"An Act concerning actions on account of death or personal injury within places under the exclusive jurisdiction of the United States."

In the body of the act it was provided that in the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the jurisdiction of the United States, within the exterior boundaries of any state, "such right of action shall exist as though the place were under the jurisdiction of [fol. 34] the state within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the state within the enterior boundaries of which it may be." It will be observed that by this act, in the body thereof, it says "such right of action", which means the actions mentioned in the title concerning death or injury within places under the exclusive jurisdiction of the United States which are within the exterior boundaries of any state.

Section 1 of the industrial insurance act, as passed in 1911, after making certain recitals, provides:

"The State of Washington therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclu-

sion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Here is a provision which expressly abolishes all civil actions and civil causes of action for personal injuries in extra-hazardous work, except as provided therein. There is nothing in the language of the Federal act which would indicate an intention on the part of Congress to extend the industrial insurance act over the navy yard, which is subject to the exclusive jurisdiction of the United States and within the exterior boundaries of this state. Had such been the intention, Congress, undoubtedly, would have plainly so indicated. The case of International Stevedoring Co. v. Haverty, 272 U. S. 50, would not support a construction of the act of Congress here involved, which would [fol. 35] extend the industrial insurance act over the navy yard. In that case, the court construed the Federal marine act of June 5, 1920, which used the word "seaman", to include "stevedores", because they were engaged in the same marine duties.

As already pointed out, the industrial insurance act has taken away all right of action except that therein provided for, and the Federal act refers to rights of action. It is true that the industrial insurance act contains a provision that, if the employer does not pay into the industrial insurance fund and an injury occurs to a workman while the employer is so in default, the action may be brought by the injured employe against the employer, and the common law defenses shall not be available. If it should be held that under this provision of the act an action could be maintained for an injury occurring in the navy yard, which is subject to the exclusive jurisdiction of the United States, then we would have a situation where a part of the industrial insurance act would extend to the navy yard and a part would not.

There is no question but that an action may be maintained under the law as it existed in this state at the time the Federal government acquired jurisdiction over the navy yard, since Congress, so far as we are informed, has passed no act which has displaced that law in the ceded territory.

In neither of the cases of Hilding v. Department of Labor and Industries, 162 Wash. 168, 298 Pac. 321, and Nickell v. Department of Labor and Industries, 164 Wash. 589, 3 P. (2d) 1005, was the question here presented considered or decided. We are of the view that the amended complaint did not state a cause of action under the industrial insurance law. Whether it stated a cause of action under the [fol. 36] law at the time jurisdiction over the navy yard was ceded to the United States, it is not necessary here to determine.

The next question is whether the action was brought in the name of the proper party. As already appears, it was brought by the widow in her individual capacity and as guardian ad litem for the minor child. It was not brought as administratrix of the estate of the deceased or in a representative capacity. In section 1, chapter 123, laws of 1917, it is provided that, when the death of a person is caused by the wrongful act, neglect or default of another, "his personal representative may maintain an action for damages against the person causing the death; * * *" Construing this statute in Broughton v. Oregon-Washington Railroad and Navigation Co., 137 Wash. 135, 241 Pac. 963, it was held that actions for damages for wrongful death must be brought by the personal representative of the deceased. It was there said:

"If it be assumed that the action was brought under state statutes, we are of the opinion that the court's decision was right upon the ground of the incapacity of appellants to bring the action. Section 183, Rem. Comp. Stat., provides that all actions for damages against a person causing the death of another shall be brought by the personal representative of the deceased. We have had occasion to construe this statute on many occasions to this effect. Machek v. Seattle, 118 Wash. 42, 203 Pac. 25; Howe v. Whitman County, 120 Wash. 247, 206 Pac. 968; Castner v. Tacoma Gas & Fuel Co., 123 Wash. 236, 212 Pac. 283."

Cases holding to the effect that the objection that the action is not brought in the name of the proper party must be timely made are of no controlling importance here, because in this case the respondents raised the question upon their first appearance and continued to insist upon it. Attention is called to Rule II, 140 Wash. p. xxv-xxxvi; but

there is nothing in that rule which would sustain the right to maintain the action by a person other than the repre-
[fol. 37] sentative of the deceased.

The judgment will be affirmed.

Main, J.

We concur:

Beals, C. J. Tolman, J. Blake, J. Steinert, J.

[fols. 38–45] Petition for rehearing, covering eight pages, omitted from this print. It was denied and nothing more by order, May 11, 1933.

[fol. 46] In Supreme Court of Washington

[Title omitted]

Order Denying Petition for Rehearing Filed May 11, 1933

The court having considered the appellant's petition for a rehearing herein,

It is ordered that the said petition, be, and it hereby is, denied.

Dated this 11 day of May, 1933.

By the Court:

Mitchell, Acting Chief Justice.

[File endorsement omitted.]

[fol. 47] In Supreme Court of Washington

No. 24301

Maxine Murray, on Her Own Behalf and as Guardian ad Litem of Maxine Lois Murray, a Minor, Appellant,

vs.

Joe Gerrick & Co., Industrial Brown Hoist Corporation, et al., Respondents

Judgment—May 12, 1933

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Kitsap County, and upon the argument of counsel, and the court having fully considered the same, and being fully

advised in the premises, it is now, on this 12th day of May, A. D. 1933, on motion of J. Speed Smith, Henry Elliott, Jr., Stephen V. Carey, of counsel for respondents, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby, affirmed, with costs; and that the said Respondents have and recover of and from the said Maxine Murray and from Fidelity & Deposit Co. of Maryland, surety, their costs, as follows: Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation, & Max Bloomenstein, $68.30; Joe Gerrick & Co. the costs of this action, taxed and allowed at Thirty & 50/100 Dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said Superior Court for further proceedings in accordance herewith.

[fol. 48] IN SUPREME COURT OF WASHINGTON

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the clerk of the above-entitled court:

You are hereby requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Certiorari in said cause, the transcript to consist of:

The record on appeal in said cause;

The opinion of the Supreme Court of the State of Washington;

All journal entries contained in the record and proceedings of the Supreme Court of the State of Washington relating to said cause; Petition for Rehearing.

The final judgment and decision of the Supreme Court of the State of Washington;

A copy of this præcipe;

Your certificate to the record that it is a complete record in said cause.

Dated this 19th day of July, 1933.

Wm. Martin, Attorney for Appellants.

Address: 611 Lowman Building, Seattle, Washington.

[fol. 49] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4051)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 308

MAXINE MURRAY, ON HER OWN BEHALF AND AS GUARDIAN AD LITEM OF MAXINE LOIS MURRAY, A MINOR, PETITIONERS,

vs.

JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R. W. KALTENBACH CORPORATION, F. W. CORNING, IRVING GOTTHEIM, AND MAX BLOOMENSTEIN, RESPONDENTS.

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Maxine Murray on her own behalf and as guardian *ad litem* of Maxine Lois Murray, a minor, pray that a writ of certiorari issue to review a final judgment of the Supreme Court of the State of Washington entered in this cause on the 12th day of May, 1933, affirming the judgment of the Superior Court of the State of Washington for Kitsap County dismissing the above entitled action.

Jurisdiction.

The final judgment below was entered May 12, 1933, in the Supreme Court of the State of Washington, a court of

last resort. The jurisdiction of this Court is provided by Sec. 237(*b*) of the Judicial Code as amended by the Act of February 13, 1925 (45 Stat. 936).

Statement.

It is admitted that Louis Henry Murray was killed through the negligence of the respondents while working for them in the construction of a steel traveling tower crane within the limits of the Puget Sound Navy Yard at Bremerton, Washington. This action was brought by Maxine Murray as widow of the said Louis Henry Murray and as guardian *ad litem* of their child, Maxine Lois Murray, to recover damages therefor (R. 1.)

The decedent entered into a contract of employment with the respondents on the 17th day of June, 1932, at Seattle, Washington, as a structural steel worker at a wage of $1.10 per hour, time to start when he left Seattle and to continue until he returned, and on said date commenced to work for the respondents upon a 20-ton steel traveling tower crane within the Puget Sound Navy Yard at Bremerton, Washington, and, while so engaged, on the 21st day of June, 1932, he fell from said crane a distance of about 25 feet, fracturing and crushing his skull and otherwise seriously damaging and injuring his body, from which injuries he died at Bremerton, Washington, on the 22nd day of June, 1932, leaving the petitioner Maxine Murray, his widow, and the petitioner Maxine Lois Murray, his only child, a minor three years of age, surviving (R. 2). Two hours of each day's work was performed by the decedent under his said contract outside of the limits of the Puget Sound Navy Yard in traveling from Seattle to Bremerton and return. All the allegations of petitioners' amended complaint stand admitted by the demurrers (R. 13-18).

Under the laws of the State of Washington at the time at which the lands within the limits of the Puget Sound Navy Yard were ceded to the United States Government by and with the consent of the State of Washington given by a legislative act passed and approved in the year 1891 (Laws 1891, p. 31; Remington's Comp. Stat., Sec. 8108), the petitioners had a right to bring this action and were the proper parties to bring the action, besides being the real parties in interest and the sole heirs and beneficiaries of said decedent to whom any amount recovered for his death must be paid. Sec. 8 of the Code of 1881 (Sec. 183 Remington & Ballinger's Ann. Code of the State of Washington), the law in force at the time the territory within the limits of the Puget Sound Navy Yard at Bremerton, Washington, was ceded to the United States Government, reads:

> "When the death of a person is caused by the wrongful act or neglect of another, his *heirs* or personal representatives may maintain an action for damages against the person causing the death."

This law has forever since remained in force within the limits of the Puget Sound Navy Yard, unless changed by an Act of Congress.

In 1917 the legislature of the State of Washington passed an act which reads:

> "When the death of a person is caused by the wrongful act, neglect or default of another, his *personal representative* may maintain an action for damages against the person causing the death" (Sec. 1, Act of 1917, Chap. 123, p. 495).

This act, passed by the legislature of the State of Washington after the lands within the Puget Sound Navy Yard had been ceded to the United States Government, did not and

could not have the effect of changing said Sec. 183 of Remington & Ballinger's Ann. Code in any manner as it was then in effect within the limits of the Navy Yard.

In 1927 the legislature of the State of Washington passed a law amending the State Workmen's Compensation Act by providing that whenever an employer is in default in the payment of any premium, the defaulting employer "shall be liable to suit by the injured workman (or his beneficiaries and dependents), at his or their option, as he would have been on March 14, 1911." (See Appendix "A".) On March 14, 1911 said Sec. 183 of Remington & Ballinger's Ann. Code was in full force, the same as it was when the lands within the Puget Sound Navy Yard were ceded to the United States Government. The amended complaint alleged that respondents were in default (R. 17).

On February 1, 1928, an Act of Congress was passed, entitled:

> "An Act Concerning Actions on Account of Death or personal Injury Within Places Under the Exclusive Jurisdiction of the United States." It reads:
>
> "Action for Death or Personal Injury Within National Park or Other Place under Jurisdiction of United States; Application of State Laws.—In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the States within the exerior boundaries of which it may be" (Feb. 1, 1928, c. 15, 45 Stat. 54, Title 16 U. S. Code Ann., 1931 Supp., Sec. 457).

Demurrers were interposed by respondents to the petitioners' complaint (R. 8, 10) and also to their amended complaint (R. 19-21). The trial court filed a memorandum opinion (R. 21) sustaining the respondents' demurrers to petitioners' amended complaint on the grounds:

1st. That any cause of action arising on account of the death of the said decedent must be brought by the personal representative of the deceased and that the petitioners had no legal capacity to sue;

2nd. That the Act of Congress of February 1, 1928 did not make any of the laws of the State of Washington Workmen's Compensation Act apply in this case (R. 22).

The petitioners gave notice of their election to stand upon their amended complaint, whereupon the trial court ordered the action dismissed (R. 22). The judgment of dismissal was affirmed by the Supreme Court of the State of Washington (R. 25). A petition for rehearing was filed (R. 30), which was denied by the Supreme Court of the State of Washington and judgment entered on May 12, 1933 affirming the judgment of the trial court dismissing the action (R. 30).

Pleadings.

Petitioners' complaint and amended complaint appear in full at pp. 1 and 11 of the record.

Opinions Below.

Trial Court (R. 21).

Supreme Court of the State of Washington (R. 25).

Questions Presented.

1. Did the Act of Congress of February 1, 1928 take from the petitioners the right to bring and prosecute this action

in their own right as the sole heirs, beneficiaries and real parties in interest of the decedent to recover damages on account of the negligence of the respondents which caused his death, and to whom all moneys recovered therefor must be paid?

2. (*a*) Does the Act of Congress of February 1, 1928 make the laws of the State within whose limits territory ceded to the United States lies apply in an action to recover damages for death or personal injury caused by the negligent act of another within a national park or other reservation under the exclusive jurisdiction of the United States?

(*b*) Was the purpose of the Act of Congress of February 1, 1928 to give to workmen working for independent contractors upon structures or projects within the limits of United States navy yards or other government reservations the benefits provided under the State workmen's compensation acts and the right to recover for injuries sustained that the United States Employees' Compensation Act gave to employees of the United States Government, while working together upon the same structures or projects? The Government got the benefit of the workmen's services in both cases, whether it paid therefor to the independent contractor or direct to its own employees. Both the lower courts held that the Act of Congress of February 1, 1928 did not make State workmen's compensation acts in force at the time of the passage of the Act apply in this case (R. 21, 25).

3. Did the laws of the State of Washington and the Act of Congress of February 1, 1928, become a part of the contract of employment entered into by the decedent at Seattle, Washington, with the respondents on June 17, 1932

and determine the substantive rights and obligations of the parties; and, if so, is such right protected by the Constitution of the United States?

Specification of Errors to be Urged.

The trial court, affirmed by the Supreme Court of the State of Washington, committed error as follows:

1st. In holding and deciding that the petitioners were not the proper parties plaintiff and were without legal capacity to sue—notwithstanding that they were the sole heirs, beneficiaries and real parties in interest, to whom all moneys recovered from respondents on account of the death of the decedent must be paid.

2nd. In holding and deciding that the Act of Congress of February 1, 1928, did not make any of the provisions of the laws of the State of Washington, known as the Workmen's Compensation Act, apply in this case.

3rd. In holding and deciding that the Act of Congress of February 1, 1928, took away from the petitioners the right to bring and prosecute this action in their own right as sole heirs and beneficiaries of the decedent.

4th. In holding and deciding that the Act of Congress of February 1, 1928, did not give to the petitioners any rights additional to those which they already possessed prior to the passage of the said Act of Congress, but, in fact, took away the right which they theretofore had to bring an action in their own names as heirs of the decedent.

5th. In sustaining respondents' demurrers to petitioners' amended complaint.

6th. In rendering judgment of dismissal and in dismissing petitioners' action.

7th. In refusing to grant petitioners' request that the petitioner Maxine Murray (who was also the widow, the personal representative of the decedent and the administratrix of his estate) be made a party plaintiff as such personal representative in this action (R. 30).

Reasons for Granting the Writ.

I.

The Supreme Court of the State of Washington has decided a number of questions of federal law of great public importance in a way which is either in conflict with applicable decisions of this Court, or else have not been, but ought to be, authoritatively decided by this Court in the public interest. The Supreme Court of the State of Washington held as follows:

1. That the Act of Congress of February 1, 1928, did not make the laws of the State of Washington in force at the time of the passage of said Act apply in an action brought by an injured workman (or, in case of his death, by his widow and children, his sole heirs and beneficiaries) caused by the negligence of an independent contractor, his employer, while working within the limits of the United States Navy Yard at Bremerton, Washington.

2. That the Act of Congress of February 1, 1928, did not give to an injured workman, while employed by an independent contractor within the limits of a United States navy yard or reservation (or, in case of his death, to his heirs and beneficiaries) any rights greater than he possessed and had prior to the passage of said Act; but that it took away from the petitioners the right to prosecute an action on their own behalf, as the sole heirs and bene-

ficiaries of the decedent, which right they had prior to the passage of said Act of February 1, 1928.

II.

The Act of Congress of February 1, 1928, has never been construed by this Court or any other court than the Supreme Court of the State of Washington in this action, which ruling in effect destroys the rights, privileges and benefits intended by Congress to be conferred upon workmen employed by independent contractors upon Government projects within United States navy yards and other Government reservations, to whom no protection has heretofore been given by either the States within which the reservations lie or the United States, all of which is of great national interest and public concern.

III.

The trial court and the Supreme Court of the State of Washington failed to recognize the substantive rights which the decedent and his heirs had under his contract of hire with the respondents, namely: the laws of the place where the contract was entered into, which became a part of the contract.

WHEREFORE it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Supreme Court of the State of Washington should be granted.

WM. MARTIN,
Attorney for Petitioners.

Seattle, Washington, July 22, 1933.

STATE OF WASHINGTON,
County of King, ss:

WM. MARTIN, being duly sworn, says:

That he is Attorney for petitioners herein and that the foregoing petition is true to the best of his knowledge, information and belief.

WM. MARTIN.

Sworn to before me this 22d day of July, 1933.
[SEAL.] H. A. MARTIN.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the court, and that it is not filed for the purpose of delay.

WM. MARTIN.

BRIEF IN SUPPORT OF PETITION.

ARGUMENT.

Petitioners Were the Proper Parties to Bring this Action.

The facts stated in petitioners' complaint and amended complaint stand admitted by the demurrers. That the laws of the State governing actions to recover damages for injuries and death occurring within the limits of a United States navy yard or other Government reservation under the exclusive jurisdiction of the United States are the laws in force at the time the territory was ceded to the United States is tersely stated by Judge Cardozo in the case of *Kaufman* v. *Hopper,* 115 N. E. 470 (N. Y.), in the following language:

> "The common law and statutes passed before the act of cession remain in force in the ceded territory until displaced by Congress (*McCarthy* v. *Packard Co.,* 105 App. Div. 436, 94 N. Y. Supp. 203 Affirmed on opinion below, 182 N. Y. 555, 75 N. E. 1130; *Barrett* v. *Palmer,* 135 N. Y. 336, 31 N. E. 1017, 17 L. R. A. 720, 31 Am. St. Rep. 835). But later statutes are of no effect. This is now the settled rule (*Farley* v. *Schermo,* 208 N. Y. 269; *Ft. Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525, 537; *W. U. Tel. Co.* v. *Chiles,* 214 U. S. 274).

Petitioners were likewise the proper parties to bring this action under Chap. 310 Laws of the State of Washington, 1927, p. 829. This law was brought into effect by the Act of Congress of February 1, 1928. It provides that an employer before commencing any work shall notify the Director of Labor and Industries of such fact and shall

accompany such notification with an estimate of the first month's payroll, together with his check for the payment of the premium on such estimated payroll; and, in case of his failure so to do and an injury happens during such period of default or, if such employer shall be in default for failure to furnish the Department with an estimated payroll, such employer shall not be entitled to the benefits of the act, but shall be liable to suit by the injured workman or his beneficiaries and dependents at his or their option, as he would have been on March 14, 1911. At that time Sec. 183 of Remington & Ballinger's Ann. Code was in full force and effect, which provided for the bringing of this action as brought by petitioners. (See Appendix "A".)

These facts were alleged by petitioners in Paragraphs X, XI, and XII of their amended complaint (R. 17, 18).

In this case the petitioners were the real parties in interest, the sole heirs and beneficiaries to whom whatever amount was recovered (whether recovered by the petitioners in their own right or by the personal representative of the decedent) would have had to be turned over to petitioners. In the case of *Bixler* v. *Pennsylvania R. Co.*, 201 Fed. 553, an action brought by Isaac P. Bixler and Hermina E. Bixler, his wife, against the railroad company to recover for the death of their son who was killed while in the employ of the railroad company and engaged in interstate traffic, so that the action came under the Employers' Liability Act (Act of Congress April 22, 1908, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322) requiring the action to be brought by the personal representative, the court said:

> "'This statute is a remedial one, enacted for the purpose of compelling those who negligently cause the death of persons to compensate the surviving husband, widow, or next of kin of the person so killed,

and, like all such statutes, should be so construed as to give, instead of withholding, the remedy intended to be provided. *Lamphear* v. *Buckingham*, 33 Conn. 237; *Haggerty* v. *Central R. R. Co.*, 31 N. J. Law, 349. The important portion of the section is that which gives a right of action, and not that part which provides who may enforce it. The latter is an incidental provision.' *Lang* v. *Houston, etc., R. Co.*, 75 Hun. 151, 27 N. Y. Supp. 90, affirmed 144 N. Y. 717, 39 N. E. 858."

citing *Stewart* v. *Baltimore & Ohio Railroad Co.*, 168 U. S. 445-449, 18 Sup. Ct. 105, 42 L. Ed. 537.

The petitioner Maxine Murray is the duly and regularly appointed administratrix of the estate of her said husband and his personal representative as well, and permission should have been granted by the lower courts that she be allowed to appear as plaintiff in this action in such capacity (R. 30).

Missouri, K. & T. R. Co. v. *Wulf*, 226 U. S. 570-78; 57 L. Ed. 355; same case in lower court, 192 Fed. 919.

The judgment of the lower court, therefore, in any event should be reversed and permission granted petitioners to substitute Maxine Murray as the personal representative and administratrix of the decedent, Louis Henry Murray, and the action continued and prosecuted by her as plaintiff in such capacity.

The Act of Congress of February 1, 1928, Applies in this Case.

The lower courts committed error in holding and deciding that the Act of Congress of February 1, 1928, did not make any of the provisions of the laws of the State of Washington known as the Workmen's Compensation Act apply in this case.

The Federal Act is clear. It says that the "rights of the parties shall be governed by the laws of the State" within which the accident occurred and "such right of action shall exist as though the place where it occurred was under the jurisdiction of the State." Language could not well be used to bring the laws of the State into effect and govern the rights of the parties to this suit more clearly than this statute has. The Act is remedial in its effect. It is elementary that the Act should be given a liberal construction in order that its benefits be extended fully to those for whom it was passed. Thousands of civilian workmen, citizens and residents of the states, work within the navy yards for independent contractors having contracts with the Government for construction work and other improvements within the navy yards. Such workmen do not come under the United States Employees' Compensation Act for the reason that they are not in the employment of the Government, but of the independent contractor; so that, in case of death or injury, the workman and his dependents in many cases were left without redress or a remedy. There was therefore a very great necessity for the passage of the Act of February 1, 1928, making the Workmen's Compensation Acts of the States within which such work is performed apply, so that an injured workman and his dependents in case of his death would be entitled to compensation under the State workmen's compensation acts while in the employment of an independent contractor doing work for the Government, as he would have been entitled to receive under the United States Employees' Compensation Act had he been in the employment of the Government instead of the independent contractor.

It is the petitioners' contention that this statute makes all the laws of the State of Washington applicable to the

petitioners' case the same as would have applied had the accident happened outside the boundaries of the navy yard. This is the clear purpose and intent of the Act.

It is well settled that statutes of a State may be adopted by reference by Congress in its enactment. The U. S. Supreme Court in the case of *Engel* v. *Davenport*, 271 U. S. 33, 70 L. Ed. 813-817, states the rule as follows:

> "The adoption of an earlier statute by reference makes it as much a part of the later act as though it had been incorporated at full length. *Kendall* v. *United States*, 12 Pet. 524, 625, 9 L. Ed. 1181, 1221; *Re Heath*, 144 U. S. 92, 94, 36 L. Ed. 358, 359, 12 Sup. Ct. Rep. 615; *Interstate Consol. Street R. Co.* v. *Massachusetts*, 207 U. S. 79, 85, 52 L. Ed. 111, 114, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555. It brings into the later act 'all that is fairly covered by the reference' (*Panama R. Co. Case*, 264 U. S. 392, 68 L. Ed. 755, 44 Sup. Ct. Rep. 391); that is to say, all the provisions of the former act which, from the nature of the subject-matter, are applicable to the later act."

It is clear, therefore, that when Congress passed the Act of February 1, 1928, it brought into effect all of the laws of the State of Washington pertaining to the action brought to recover thereunder for the death of the decedent Louis Henry Murray. It must also be conceded that the laws brought into effect by the Act of February 1, 1928, were additional to the laws of the State of Washington already in force in the ceded territory—that is, within the bounds of the Puget Sound Navy Yard. Otherwise, the Act of February 1, 1928, would have no effect whatever. It would be meaningless. To give the Act the construction given it by the lower court would render it of no effect whatever, as the petitioners had all the rights under the law as it existed prior to the passage of the Act of February 1, 1928,

that they now have under the decision of the lower court in this case.

The laws of the State of Washington governing the relationship between master and servant, generally spoken of as the Workmen's Compensation Act, do not only provide for compensation for injuries, but provide as it were a code of laws for the recovery by the workman from his employer damages for injuries which he receives through the owner's negligence in certain respects and under certain conditions apart entirely from the compensation provisions, and provide who may bring the suit to recover such damages and to whom the damages recovered therefor shall belong. In speaking of our Workmen's Compensation Act, the Supreme Court of the State of Washington in the case of *State* v. *Cowlitz County*, 146 Wash. 309, uses the following language:

> "This, being an act relating to the compensation of injured workmen, is comprehensive enough to include all manner of compensation for such workmen and all the means by which such compensation may be obtained. The title does not indicate that the only compensation provided for is that which is obtained through industrial insurance, although we popularly speak of the act as an industrial insurance act. The act provides for compensation by industrial insurance in certain cases, and also provides for the obtaining of compensation by injured workmen from their employers by legal action, and in the section to which we are now confining our attention, provides, among other things, the defenses available to such employers."

The Washington State Workmen's Compensation Act was passed in the year 1911 (Ch. 74, Session Laws of the State of Washington, 1911, p. 345, Remington & Ballinger's Ann. Code, 1913 Supp., Sections 6604-1 to 6604-32, Remington's Comp. Stat. of Washington, Sections 7673-7796 and

1927 Supp., Sections 7673-7796-2). The act is a complete code and, as stated by the Supreme Court above, not only provides for compensation for injured workmen through industrial insurance, but also provides for the obtaining of compensation by injured workmen from their employers by legal action and provides, among other things, the defenses available in actions at law to recover for such injuries.

Under decedent's contract of hire, two hours of each day of his time was put in outside of the limits of the Navy Yard, so that the Workmen's Compensation Act of the State of Washington would apply irrespective of the Act of February 1, 1928, under decedent's said contract of hire.

The Act of Congress of February 1, 1928, and the Laws of the State of Washington, including the provisions of the Workmen's Compensation Act, became a part of the contract of employment in this case.

The provisions of the 1927 amendment to the Workmen's Compensation Act of the State of Washington, together with the provisions of the act and the Act of Congress of February 1, 1928, apply to this case for the reason that they were in full force and effect at the time at which the decedent entered into his contract of hire with the respondents and became a part of his contract of employment. This is a well settled rule. The rule is announced by the Supreme Court of the State of Washington in the case of *Thorp* v. *Department of Labor & Industries,* 145 Wash. 498, in which that court quotes and approves this rule as announced by the Supreme Court of Connecticut in the case of *Quilty* v. *Connecticut Company,* 96 Conn. 124, 113 Atl. 149, as follows:

> "The right to compensation arises from the contractual relation between the employer and the em-

ployee existing at the time of the injury, and the statute then in force in relation to compensation formed a part of the contract of employment, and determined the substantive rights and obligations of the parties.

"The obligations of the employer to dependents of an employee in case of the death of an injured employee are equally substantive obligations, and are also fixed and determined by the statute in force at the time of the injury."

Conclusions.

It is accordingly submitted that the decision of the Supreme Court of the State of Washington in this case is incorrect in the following respects:

(*a*) In that it defeats the great purpose which Congress had in passing the Act of February 1, 1928: to enable those injured (and their dependents) to recover and be remunerated therefor when injured through the neglect of another within a Government reservation by and under the laws of the respective States in which such reservations were situated.

(*b*) In depriving the petitioners the right granted by the provisions of the Workmen's Compensation Act of the State of Washington to be remunerated and to recover thereunder for the damages sustained on account of the negligence of the respondents.

(*c*) In holding that the petitioner Maxine Murray, the widow of the decedent, was not (in suing in her own right) a proper party plaintiff, and in refusing her request to be designated a party plaintiff as administratrix of the estate of said decedent as well.

The case is a proper one for review by this Court.

WM. MARTIN,
Attorney for Petitioners.

APPENDIX "A".

Laws of Washington, 1927, Ch. 310.

"* * * Every employer * * * shall, before so commencing or resuming operations, as the case may be, notify the director of labor and industries of such fact, accompanying such notification with an estimate of his payroll for the first calendar month of his proposed operations, and shall make payment of the premium on such estimated payroll" (P. 829).

"* * * In respect to any injury happening to any of his workmen during the period such employer shall be in default in the payment of any premium, if such default be after demand for payment, or if such employer shall be in default for failure to furnish the department with an estimated payroll or with monthly reports of his payroll as required under section 7676 of Remington's Compiled Statutes, the defaulting employer shall not be entitled to the benefits of this act, but shall be liable to suit by the injured workman (or his beneficiaries and dependents), at his or their option, as would have been on March 14th, 1911, and in any action brought against such employer, it shall be no defense for such employer to show that such injury was caused in whole or in part by the negligence of a fellow servant of the injured workman, that the negligence of the injured workman, other than his wilful act committed for the purpose of sustaining the injury, contributed to the accident, or that the injured workman had knowledge of the danger or assumed the risk which resulted in his injury" (Pp. 831-32).

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In the Supreme Court United States

OCTOBER TERM, 1933

No. 308

MAXINE MURRAY, on her own behalf, and as Guardian Ad Litem of MAXINE LOIS MURRAY, a minor,

Petitioners,

vs.

JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R. W. KALTENBACH CORPORATION, F. W. CORNING, IRVING GOTTHEIM, and MAX BLOOMENSTEIN,

Respondents.

PETITIONERS' BRIEF ON RESPONDENTS' MOTION TO DISMISS

The authorities cited by the respondents in their motion have no application to the judgment or facts in this case. They all relate to judgments entered in the lower courts for the amount in controversy and, of course, all must join on an appeal or petition for writ of certiorari, or an order of summons and severance taken. That is well settled. They have no ap-

plication to a judgment against one of the parties merely for costs.

The judgment in this case against the Fidelity & Deposit Company of Maryland, as surety, was one for costs only. (The bond for costs on which the judgment was entered in this case appears in the original transcript at p. 28 (omitted in printing). The judgment appears in the original transcript at p. 47, and in the printed record at p. 30.) The condition of the cost bond on which the judgment for costs was entered against the Fidelity & Deposit Company of Maryland read as follows:

> "NOW, THEREFORE, if the said Principal, MAXINE MURRAY, on her own behalf and as Guardian Ad Litem of Maxine Lois Murray, shall pay to JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R.W. KALTENBACH CORPORATION, F.W. CORNING, IRVING GOTTHEIM, and MAX BLOOMENSTEIN, the defendants above named, all costs and damages that may be awarded against her on the appeal, or on the dismissal thereof, not exceeding the sum of TWO HUNDRED DOLLARS ($200.00), then this obligation to be void; otherwise to remain in full force and effect."

The Fidelity & Deposit Company of Maryland, as surety, only became liable thereon in case the principal, Maxine Murray, the petitioner, failed to pay the costs so awarded. The surety company never was

made a party to this action and was not "connected with the case or interested in the controversy" between the petitioners and respondents in any way. No supersedeas bond was ever given, nor a stay of proceedings ever asked or had in this case. The respondents were at liberty at all times to proceed to recover their costs in the lower courts if they chose to do so.

IT IS WELL SETTLED THAT THIS COURT WILL NOT REVIEW AN APPEAL OR GRANT CERTIORARI TO REVIEW A JUDGMENT SIMPLY FOR COSTS.

Circuit Judge Seaman, in the case of *Harding v. Corn Products Mfg. Co.*, 198 Fed. 628, states the rule as follows:

> "The Supreme Court, commencing with *Canter v. American Insurance Co.*, 3 Pet. 307, 316 (7 L. Ed. 688), has invariably pronounced the rule to be that 'no appeal lies from a mere decree respecting costs' against a party in suit, in equity or admiralty. See 3 Notes U. S. Rep. 70; *Gunckel on Costs in Federal Courts*, c. 35, Sec. 80. In *City Bank of Ft. Worth v. Hunter*, 152 U. S. 512, 516, 14 Sup. Ct. 675, 676 (38 L. Ed. 534)."

In the case of *Wright v. Gorman-Wright Co.*, 152 Fed. 408, at 410, in the Fourth Circuit (certiorari denied 207 U. S. 587, 53 L. Ed. 353), the court says:

> "There is another reason why appellant is not entitled to invoke the jurisdiction of this court.

It is well settled that in cases like the one under consideration an appeal will not lie from a decree for costs. In the case of *Elastic Fabrics Co. v. Smith,* 100 U. S. 110, 25 L. Ed. 547, Mr. Chief Justice Waite, in delivering the opinion of the court, said:

> 'No appeal lies from a mere decree respecting costs and expenses.'

Also, in the case of *Dubois v. Kirk,* 158 U. S. 58-67, 15 Sup. Ct. 729, 39 L. Ed. 895, Mr. Justice Brown, in delivering the opinion of the court, said:

> 'This court held in several cases that an appeal does not lie from a decree for costs.'

Justice Story, in delivering the opinion of the court in the case of *Canter v. Insurance Co.,* 3 Pet. 318, 7 L. Ed. 688, said:

> 'No appeal lies from a decree respecting costs and expenses.'
>
> Also the following cases sustain this view: *Paper Bag Machine Co. Cases,* 105 U. S. 766, 26 L. Ed. 959; *Wood v. Weimar,* 104 U. S. 786, 26 L. Ed. 779; *Russell v. Farley,* 105 U. S. 433, 26 L. Ed. 1060."

A judgment against a party for costs does not give him an appealable interest in the judgment upon the merits.

Smith v. Indiana, 191 U. S. 138, 48 L. Ed. 125. It must be such personal interest in the litigation as he has suffered or may suffer by the decision. One

who has not the requisite interest as thus intended cannot appeal nor can one who is not aggrieved by the judgment from which the appeal is sought.

Tyler v. Judges of Court of Registration, 179 U. S. 405, 45 L. Ed. 252.

The Fidelity & Deposit Company of Maryland was therefore not a proper party to be joined with the petitioner, Maxine Murray, on her petition for certiorari or against whom she should have had summons and severance issued.

It is therefore definitely settled that the Fidelity & Deposit Company of Maryland in this case could not have appealed from the judgment for costs against it or prosecuted a petition for a writ of certiorari to review the same. Nor were the respondents prevented in any way from proceeding to collect their costs at any time by reason of the petitioners' having applied to this court for a writ of certiorari without having summons and severance issued against the Fidelity & Deposit Company of Maryland. These are the two reasons given by this Court requiring the service of summons and severance against a party to an action on appeal or writ of certiorari to this Court.

REASONS FOR REQUIRING ISSUANCE OF SUMMONS AND SEVERANCE AGAINST PARTY NOT JOINING IN APPEAL OR PETITION FOR CERTIORARI.

This Court, in the case of *Hartford Accident & Indemnity Co. v. Bunn,* 285 U. S. 169, at 180, 79 L. Ed. 685, at 689, announces the rule and reasons for it as follows:

> "There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record. . . . One of the effects of this judgment of severance was to bar the party who refused to proceed, from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature."

None of these reasons given, requiring the issuance of a summons and severance, exist in this case. The rule, therefore, requiring the issuance of summons and severance, likewise ceases.

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND WAS FULLY NOTIFIED IN WRITING BY THE PETITIONER OF HER APPLICATION FOR WRIT OF CERTIORARI IN THIS CASE.

The Fidelity & Deposit Company of Maryland was also not only notified of the application of the

petitioners in this case to the Supreme Court of the United States for a writ of certiorari, but also refused to join or take any steps in the matter for the reason that it was not interested in the case. A written copy of the petition of the petitioners for a writ of certiorari, together with a copy of the record, was served upon the Fidelity & Deposit Company of Maryland and acknowledgment of receipt of service thereof accepted and forwarded to the Clerk of this Court for filing.

The Fidelity & Deposit Company of Maryland has also entered its appearance in this action, Appendix Exhibit "B," through William Martin, Esq., its attorney, and submits to the jurisdiction of this Court as fully as though it had joined with the petitioners in their petition for a writ of certiorari, and has waived the time for filing briefs and all other proceedings had herein, to the end that the petitioners may be heard as fully and to all intents and purposes upon their petition as though it had originally joined therein and had not heretofore, on notice, refused so to do. Under the following authorities, that constitutes sufficient compliance with the rule and, as said by Circuit Judge Gilbert in *Richards v. American Bank*, 234 Fed., 300, it "thereby became a party to all intents and purposes as though originally joined." And, as

said by Circuit Judge Warrington in the case of *Hill v. Western Electric Co.*, 214 Fed. at 245,

> "In these circumstances we are disposed to treat the record as including the bankrupt at least as a party appellee. *Richardson v. Green,* 130 U. S. 104, 114, 115, 9 Sup. Ct. 443, 32 L. Ed. 872; *Dayton v. Lash,* 94 U. S. 112, 24 L. Ed. 33. He has been given ample opportunity to be heard on the appeal, and so the rule and the reason for requiring his presence (that is, that the successful party shall be at liberty to enforce the decree against parties who do not desire to have it reviewed, and the appellate tribunal shall not be required to decide the same question on the same record more than once) are practically satisfied (*Masterson v. Herndon,* 77 U. S. (10 Wall.) 416, 417, 19 L. Ed. 953; *Davis v. Mercantile Trust Co.,* 152 U. S. 590, 593, 14 Sup. Ct. 693, 38 L. Ed. 563; *In re Dandridge & Pugh,* 209 Fed. 838, 126 C. C. A. 562 (C. C. A. 7th Cir.), *although the time within which Rankin might have appealed has long since expired.* Questions like this are regulated by the rule governing appeals in equity in the courts of the United States. *General Order in Bankruptcy,* No. 36 (89 Fed. xiv, 32 C. C. A. xxxvi). The rule in equity, as well as the federal statutory policy, is liberal in allowing amendments respecting any defect in process or pleading. 1 *Foster,* Fed. Prac. (3rd Ed.) Sections 160, 161, et seq.; *Browning v. Boswell,* 209 Fed. 788, 791, 126 C. C. A. 512, (C. C. A. 4th Cir.). It is not suggested that the practice in this respect in equity or bankruptcy is less liberal than it is at law (*Carey v. Donohue,* 209 Fed. 328, 330, 126 C. C. A. 254 (C. C. A. 6th Cir.)); and the course we are now pursuing is well within the reason of the kindred rule recognized in appellate courts in cases at law (*Teel v.*

Chesapeake & O. Ry. Co. of Virginia, 204 Fed. 914, 917, 123 C. C. A. 210 (C. C. A. 6th Cir.), and citations). The motion to dismiss must therefore be overruled."

ALL COSTS, WITH INTEREST, AWARDED ON COST BOND IN THIS CASE WERE PAID INTO COURT BY PETITIONER.

The judgment for costs against the Fidelity & Deposit Company of Maryland (R. 30) on remand was filed with the Clerk of the Superior Court of the State of Washington for Kitsap County on May 16, 1933, and the amounts awarded as costs, with all interest thereon, have been paid into the Clerk's office of the Superior Court of the State of Washington for Kitsap County in this case by the petitioner, Maxine Murray, for the respondents, in compliance with the petitioner's obligation under her said cost bond so to do. (Certified copy of judgment and certificate of Clerk of the Superior Court of the State of Washington for Kitsap County, with seal of court, filed with the Clerk of this Court, a copy of which is marked Exhibit "A" in appendix).

At the time at which the Fidelity & Deposit Company of Maryland signed the cost bond as surety for Maxine Murray, the company took indemnity from the petitioners fully indemnifying it against all lia-

bility under the bond or for the payment of any costs which it might be required to make. The surety company did not in anywise stand in the light of a party to this action but only in lieu of a deposit for costs in the sum of $200 which the petitioner, Maxine Murray, could as well have deposited with the Clerk of the Superior Court of the State of Washington for Kitsap County in place of giving any cost bond on appeal. Had this course been pursued by the petitioner, would respondents still contend that petitioner would be required to have summons and severance issued against the deposit for costs which stood in lieu of the cost bond?

RESPONDENTS WAIVED THE OBJECTION NOW URGED IN THEIR MOTION TO DISMISS BY NOT MAKING THE MOTION WITHIN THE TIME REQUIRED FOR HEARING PETITIONERS' PETITION FOR WRIT OF CERTIORARI, AND BY WAITING UNTIL THIS COURT GRANTED CERTIORARI.

The petition for certiorari was filed August 3, 1933, and certiorari granted October 9, 1933.

It is respectfully submitted that respondents' motion to dismiss should be denied.

WM. MARTIN,

Attorney for Petitioners.

APPENDIX

"Exhibit A"

10433

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MAY SESSION A. D. 1933

BE IT REMEMBERED, That at a regular session of the Supreme Court of the State of Washington begun and holden at Olympia on the second Monday of May, A. D. 1933, it being the Eighth day of said month, among other, the following was had and done, to-wit:

Friday, May 12th, 1933.

MAXINE MURRAY on her own behalf, and as Guardian ad litem of MAXINE LOIS MURRAY, a minor, *Appellant,* vs. JOE GERRICK & CO., INDUSTRIAL BROWN HOIST CORPORATION, et al, *Respondents.*	No. 24301 JUDGMENT

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Kitsap County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 12th day of May, A. D. 1933, on motion of J. Speed Smith, Henry Elliott, Jr., Stephen V. Carey, of counsel for respondents, considered, ad-

judged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said Respondents have and recover of and from the said Maxine Murray and from Fidelity & Deposit Co. of Maryland, surety, their costs as follows: Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation and Max Bloomenstein, $68.30; Joe Gerrick & Co., the costs of this action taxed and allowed at Thirty and 50/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

I, C. S. REINHART, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing is true copy of the Judgment and Decree in said cause, as the same now remains of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 12th day of May, A. D. 1933.

(Supreme Court Seal). C. S. REINHART,

Clerk of the Supreme Court,
State of Washington.

Filed May 16, 1933.
Reina M. Osburn, Clerk,
By Arthur Lund, Deputy.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KITSAP COUNTY

MAXINE MURRAY on her own behalf, and as Guardian ad litem of MAXINE LOIS MURRAY, a minor,

Appellant,

vs.

JOE GERRICK & CO., INDUSTRIAL BROWN HOIST CORPORATION, et al,

Respondents.

No. 10433
CERTIFICATE

I, REINA M. OSBURN, County Clerk, and by virtue of the laws of the State of Washington, ex-officio Clerk of the Superior Court of the State of Washington, in and for said County, do hereby certify that the annexed and foregoing is a true and correct copy of the Judgment of the Supreme Court in the above entitled action, as the same now appears on file and of record in my office.

I hereby further certify that the amounts stated in said Judgment to-wit: Sixty-eight and 30/100 ($68.30), and Thirty and 50/100 ($30.50), with interest at 6 per cent per annum from the 12th day of May, A. D. 1933, have been paid in full into this office by Maxine Murray the plaintiff in this court and the appellant in the Supreme Court of the State of Washington, for respondents.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 16th day of November, 1933.

REINA M. OSBURN, *Clerk.*
By ARTHUR LUND, *Deputy.*

(Superior Court Seal)

"Exhibit B"

SUPREME COURT OF THE UNITED STATES

October Term, 1933

No. 308

MAXINE MURRAY, on her own behalf, and as Guardian ad litem of MAXINE LOIS MURRAY, a minor,

Petitioners,

vs.

JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R. W. KALTENBACH CORPORATION, F. W. CORNING, IRVING GOTTHEIM and MAX BLOOMENSTEIN,

Respondents.

APPEARANCE

Comes now the Fidelity & Deposit Company of Maryland, the party named as surety with the petitioner, Maxine Murray, as principal, in the judgment appearing at page 30 of the Printed Record in the above proceedings, by and through William Martin, Esq., its attorney, and enters its appearance and submits to the jurisdiction of this Court in this action as fully as though it had joined with the petitioner in her petition for a writ of certiorari; and does hereby waive the time for filing briefs and all other proceedings had herein, to the end that the petitioners may be heard as fully and to all intents and purposes

upon their petition as though it had originally joined therein and had not heretofore, on notice, refused so to do.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By J. A. CATHCART, *Its Agent.*

WM. MARTIN,
Attorney for Fidelity & Deposit Company of Maryland.

Address: 611 Lowman Building, Seattle, Washington.

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In the Supreme Court United States

October Term, 1933
No. 308

MAXINE MURRAY, on her own behalf and as Guardian Ad Litem of Maxine Lois Murray, a Minor,

Petitioners,

vs.

JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R. W. KALTENBACH CORPORATION, F. W. CORNING, IRVING GOTTHEIM, and MAX BLOOMENSTEIN,

Respondents.

WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Reply Brief of Petitioners

The assignments of error and brief in the petition for certiorari constitute petitioners' opening brief.

Respondents in their answering brief, which was filed subsequent to the granting of certiorari, rely upon two points upon which they ask this Court to affirm the decision of the lower court. They are:

I. That the provisions of the Workmen's Compensation Act of the State of Washington do not apply to the facts in this case (Respondents' Brief, p. 9); and

II. That the petitioners do not have the legal capacity to sue (Respondents' Brief, p. 15).

I

Respondents have overlooked the facts pleaded (and admitted) in petitioners' complaint, which give the petitioners a right of action against the respondents. The Workmen's Compensation Act of the State of Washington did not abolish the right of action given to the dependents and beneficiaries of a decedent workman whose death was caused by the wrongful act or neglect of the employer, if the employer had failed and neglected to submit his payroll to the Department of Labor and Industries of the State and pay the premium to the State called for by the law. The act expressly provided that, if injury or death happened to a workman while the employer was in default in the payment of his premiums, the decedent workman's beneficiaries and dependents could bring an action against the employer the same as they could have under the law as it existed before the adoption of the Workmen's Compensation Act on March 14, 1911; in which event the employer was deprived of the defenses of contributory negligence, assumption of risk, and negligence of a fellow servant. Respondents, the employers of the decedent, Louis

Henry Murray, could have filed their payroll and paid the premiums thereon to the State and thereby secured to themselves the benefits of the law. This they failed to do and left themselves subject to suit with the defenses stated cut off, as stated by the Supreme Court of the State of Washington in the case of *State v. Cowlitz County,* 146 Wash. 309, as quoted at p. 16 of petitioners' Petition.

The arguments of respondents, therefore, as to the purpose, policy, etc., of the Workmen's Compensation Act of the State of Washington, its limits, application and construction, have no application under the facts alleged by the petitioners in their complaint in this action. The provisions of the Workmen's Compensation Act gave to the petitioners a right of action against the respondents the same as they had before the Workmen's Compensation Act was passed, and to prosecute the action in their own names, they were made a part of the law in force within the Puget Sound Navy Yard by the Act of Congress of February 1, 1928, the same as any other law of the State of Washington applicable to the facts.

The title of the Act of Congress of February 1, 1928, reads:

"An Act concerning actions on account of death or personal injury within places under the exclusive jurisdiction of the United States."

In such actions, it says that "the rights of the parties shall be governed by the laws of the State" within which the accident occurred, and that "such right of action shall exist as though the place were under the jurisdiction of the State."

Language could not well be used to bring the laws of the state into effect applicable to the facts alleged by the petitioners in their amended complaint and govern the rights of the parties to the suit more clearly than this statute has. The statute is remedial in its effect and should be liberally construed so as to give the petitioners, the injured parties, the benefits intended. In this case the structural steel and all the material for the tower traveling crane was manufactured and prepared outside the Navy Yard. It was shipped there to be assembled and erected. The decedent, Louis Henry Murray, was so engaged and working at the time he was killed through the negligence of the respondents. It was being erected on a track just within one of the gate entrances to the Navy Yard. The crane moved on a track with its own power. It could just as well have been assembled and erected outside the gate upon the same track and moved

through the gate with its own power. Had the decedent been working upon this crane just outside the gate of the Navy Yard and been killed exactly in the manner he was killed while working upon the same crane within the Navy Yard, would it be contended for a moment, under those circumstances, that the provisions of the Workmen's Compensation Law of the State of Washington did not apply? If under those circumstances they did apply, then the Act of Congress of February 1, 1928, made them apply to this case within the Navy Yard where the decedent was killed

The very purpose of the act was to give redress to the dependents and beneficiaries of those who had met their death while working within the navy yards and government reservations who, before the passage of the Act of Congress of February 1, 1928, were left destitute and without redress. The name of the author of the bill, the late Honorable Thomas J. Walsh, Senator from the State of Montana, is alone sufficient to show the purpose of the bill. His every act and purpose and the uppermost thought in his mind during his long service was to enact laws that would give those who suffered loss through the wrongful act of another a remedy.

II

Respondents' argument under their second point, that the petitioners had no legal capacity to sue, is not well taken for the reason that, by the provisions of the Workmen's Compensation Act itself as amended by the 1927 amendment (see Appendix "A," p. 19 Petition, and Appendices I and II, pp. i-iv Brief of Respondents), the petitioners were not only expressly given the right (as sole dependents and beneficiaries of the decedent) to bring this action in their own names, but were required to do so. This 1927 amendment was in full force in the State of Washington at the time of the passage of the Act of Congress of February 1, 1928.

The 1917 amendment to the Washington Wrongful Death Statute, on which the respondents rely to sustain their contention that the petitioners have no legal capacity to sue, itself provided that the provi ons of the Workmen's Compensation Act and the 1927 amendment thereto giving the right and requiring the petitioners to bring the action in their names was not to be affected in any way by the 1917 amendment. (See copy 1917 Amendment, Appendix hereto). Sec. 5 of the 1917 Amendment to the Wrongful Death Statute of the State of Washington provided:

> "This act shall not repeal or supersede chapter 74 of the Laws of 1911 and acts amendatory thereof, or any part thereof."

Chapter 74 of the Laws of 1911 is the act properly known as the Washington Workmen's Compensation Act, passed March 14, 1911.

It is conceded by the respondents (p. 20 Brief of Respondents), that, under the laws of the State of Washington in force within the Navy Yard up till the time of the passage by Congress of the Act of February 1, 1928, the petitioners had the right to bring this action in their own names, as they have done.

Respondents base their argument that the Act of Congress of February 1, 1928, took away the right from the petitioners to prosecute this action in their own names, and ask this Court to construe the Act of Congress of February 1, 1928, as taking away rights which the petitioners had prior to the date of its enactment (that is, the right to bring this action in their own names), instead of giving to petitioners any additional rights to those they already had. It is conceded that the Act of 1917 of the Legislature of the State of Washington, passed subsequent to the time at which the United States government acquired the territory within the Navy Yard at Bremerton, Washington, had no application whatever to actions brought

under the Wrongful Death Statute of the State of Washington in force at the time the government acquired the lands within the limits of the Navy Yard.

We submit that, if the Act of Congress of February 1, 1928, put the 1917 amendment to the Washington Wrongful Death Statute in effect within the Navy Yard at Bremerton, then it put the provisions of the Workmen's Compensation Act giving the right to the dependents and beneficiaries of a decedent workman under the conditions referred to by the Supreme Court of the State of Washington in *State v. Cowlitz County, supra,* into effect also, as both laws were in force at the time the Act of Congress of February 1, 1928, went into effect; and that this action was properly brought in their own names.

This Court, in passing on who are the proper parties to bring an action to recover damages under a wrongful death statute has adhered to the doctrine that:

> "The important portion of the" law "is that which gives a right of action, and not that part which provides who may enforce it. The latter is an incidental provision." *Bixler v. Pennsylvania R. Co.,* 201 Fed. 553; citing *Stewart v. Baltimore & Ohio R. Co.,* 168 U. S. 445-449, 18 Sup. Ct. 105, 42 L. Ed. 537, and *Missouri, K. & T. R. Co. v. Wulf,* 226 U. S. 570-78; 57 L. Ed. 355; same case in lower court, 192 Fed. 919,

and, where the action was brought by the real parties in interest instead of the personal representative, has always permitted an amendment to be made correcting the error, if such it was.

It is respectfully submitted that, for the reasons advanced and assignments of error alleged, the judgment of the lower court should be reversed upon the merits and a new trial be granted to petitioners; and, in case this Court should hold that the personal representative of the decedent, Louis Henry Murray, was the proper party to bring this action to recover on account of his death, that the petitioner Maxine Murray (who is also the legal representative of her decedent husband, the widow, and, with her child, the real parties in interest, the sole heirs, dependents and beneficiaries and the parties to whom any recovery had must be paid), be made a party plaintiff in her capacity as the legal representative of the decedent also.

This same request was made to the Supreme Court of the State of Washington on the petitioners' appeal thereto in this case, in the following language:

> "However, should the Court differ * * * in remanding the case, the lower court should be directed to permit an order to be entered allowing the plaintiff to be made a party plaintiff in this action as the personal representative of the decedent, which she was and is—the administrator

of the decedent's estate—and be permitted to file an amended complaint in the lower court." (Original Transcript of Record, p. 45. Omitted in printing.)

This request we repeat in this Court.

Respectfully submitted,

WM. MARTIN,

Attorney for Petitioners.

APPENDIX

SESSION LAWS, 1917. CHAPTER 123.

RECOVERY OF DAMAGES FOR WRONGFUL DEATH.

An act granting a right to recover damages for the death of a person caused by the wrongful act, neglect or default of another, and repealing section 183 of Remington & Ballinger's Annotated Codes and Statutes of Washington.

Be it enacted by the Legislature of the State of Washington:

Section 1. When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

Sec. 2. Every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused. If there be no wife or husband or child or children, such action may be maintained for the benefit of the parents, sisters or minor brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death. In every such action the jury may give such damages as,

under all circumstances of the case, may to them seem just.

Sec. 3. Words in this act denoting the singular shall be understood as belonging to a plurality of persons or things. The masculine shall apply also to the feminine, and the word person shall also apply to bodies politic and corporate.

Sec. 4. Section 183 of Remington & Ballinger's Annotated Codes and Statutes of Washington shall be and is hereby repealed: *Provided, however,* That the grant, terms and conditions of said section 183 shall apply to all suits now pending, and all causes of action thereunder for wrongful death accruing within three years immediately prior to the taking effect of this act.

Sec. 5. This act shall not repeal or supersede chapter 74 of the Laws of 1911 and acts amendatory thereof, or any part thereof.

Passed the Senate February 27, 1917.

Passed the House March 7, 1917.

Approved by the Governor March 14, 1917.

Supreme Court of the United States

OCTOBER TERM, 1933

No. 308

MAXINE MURRAY, on her own behalf and as Guardian ad Litem of Maxine Lois Murray, a minor,

Petitioners,

vs.

JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R. W. KALTENBACH CORPORATION, F. W. CORNING, IRVING GOTTHEIM, and MAX BLOOMENSTEIN,

Respondents.

MOTION TO DISMISS FOR WANT OF JURISDICTION AND BRIEF IN SUPPORT THEREOF.

MOTION.

Respondents move to dismiss this action for want of jurisdiction for the reason that the judgment sought to be reviewed is a joint judgment against the petitioner Maxine Murray and Fidelity & Deposit Company of Maryland; that said Fidelity & Deposit Company of Maryland has not joined in the petition for certiorari and the record fails to disclose summons and severance.

STEPHEN V. CAREY,

Attorney for Joe Gerrick & Company and F. W. Corning, Respondents.

J. SPEED SMITH,
HENRY ELLIOTT, JR.,

Attorneys for Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation and Max Bloomenstein, Respondents.

BRIEF IN SUPPORT OF MOTION.

The petitioner, Maxine Murray, was the plaintiff and appellant below. The judgment of the Supreme Court of the State of Washington sought to be reviewed was entered on May 12, 1933. It is a joint judgment against the petitioner, Maxine Murray, and Fidelity & Deposit Company of Maryland (Tr. of Record, pp. 30, 31). The Fidelity & Deposit Company of Maryland did not join in the petition for certiorari in this court nor does the record disclose summons and severance.

The court is without jurisdiction under the following authorities:

Hartford Accident & Indemnity Co. v. Bunn, 285 U. S. 169;

Capital National Bank v. Hinds County, 286 U. S. 550;

Fidelity Union Casualty Co. v. Hanson, 287 U. S. 599;

Louisville & Nashville Rd. Co. v. Parker, 287 U. S. 569;

Wagner Tug Boat Co. v. Meagher, 287 U. S. 657.

Respectfully submitted,

STEPHEN V. CAREY,
Attorney for Joe Gerrick & Company and F. W. Corning, Respondents.

J. SPEED SMITH,
HENRY ELLIOTT, JR.,
Attorneys for Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation and Max Bloomenstein, Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 308

MAXINE MURRAY, on her own behalf and as Guardian ad Litem of MAXINE LOIS MURRAY, a minor, Petitioners,

vs.

JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R. W. KALTENBACH CORPORATION, F. W. CORNING, IRVING GOTTHEIM and MAX BLOOMENSTEIN, Respondents.

Writ of Certiorari to the Supreme Court of the State of Washington

Brief of Respondents

MOTION TO DISMISS

The respondents have heretofore served and filed a motion to dismiss the writ of certiorari herein, supported by their printed brief. Owing to the time re-

quired under the rules for noting said motion for hearing, the same cannot be brought on to be heard until too late for the filing of a brief upon the merits, in view of the position of this case upon the calendar. Therefore, without waiving their motion to dismiss, the respondents herewith submit their brief upon the merits, in order that there may be no unnecessary delay in obtaining a hearing upon the merits in the event, and *only* in the event, the motion to dismiss is denied.

The petitioner has filed a brief in opposition to the respondents' motion to dismiss in which it is sought to avoid or evade the holding of this court in *Hartford Accident & Indemnity Company v. Bunn*, 285 U. S. 169, upon four grounds.

First: It is claimed (Petitioner's Brief on Motion to Dismiss, pp. 6, 7) that the Fidelity and Deposit Company of Maryland was notified of the application for a writ of certiorari and refused to join or take any steps in the matter, et cetera. No reference to the printed record is made to support this claim and the respondents have no knowledge of any such alleged proceedings. If such proceedings were taken after the three months had elapsed during which application for the writ might be made, the proceedings are wholly ineffectual.

Second: It is said (Petitioner's Brief on Motion to Dismiss, p. 7) that the Fidelity and Deposit Company of Maryland has now entered its appearance and submitted itself to the jurisdiction of the court. This likewise is ineffectual. That is exactly what the surety in *Hartford Accident & Indemnity Company v. Bunn*, 285 U. S. 169, unsuccessfully attempted to do. Obviously the surety cannot now voluntarily submit itself to the jurisdiction of the court if the court acquired no jurisdiction within the three-months' period.

Third: It is claimed (Petitioner's Brief on Motion to Dismiss, p. 9) that the judgment for costs has been paid. A certificate by the clerk of the Superior Court of Kitsap County is appended to petitioner's brief to support this statement. The certificate is dated November 16, 1933. It does not disclose when the costs were paid. The fact is, however, that these costs were paid after the respondents' motion to dismiss was served. Moreover, it is difficult to see how satisfying the judgment which the petitioner seeks to review can aid the petitioner. That would seem to be an additional ground for dismissing the action as moot.

Fourth: Finally, it is said (Petitioner's Brief on Motion to Dismiss, p. 9) that at the time the Fidelity and Deposit Company of Maryland signed the bond as surety it took indemnity from the petitioner. It

is not clear what significance this is thought to have but it suffices to say that the record furnishes no basis for this claim.

In the *Hartford* case the court repeatedly stated that it will look only to the face of the judgment sought to be reviewed and if the judgment on its face is joint in form, the proceedings will be dismissed unless all parties to the judgment have joined in the petition or unless there has been a summons and severance.

STATEMENT

The action in the trial court was disposed of upon demurrer to the amended complaint. The demurrer was argued upon two grounds; first, that it did not state any cause of action under the State Workmen's Compensation Act, and second, that the plaintiff did not have legal capacity to maintain an action for wrongful death. The demurrer was sustained by the trial court. (Memorandum Opinion, R. 21-22.) Upon appeal the judgment was affirmed by the Supreme Court of Washington. (Opinion, R. 25-30.)

The action is to recover for alleged wrongful death. The amended complaint is double-barreled. It is founded first upon the terms of the Workmen's Compensation (Industrial Insurance Act) of the State of

Washington. In the second place it is claimed that the amended complaint alleges a good cause of action for wrongful death outside the terms of the Act.

Insofar as the first contention is concerned, consideration must first be directed to the provisions of the Industrial Insurance Act. The pertinent provisions of this Act are set forth at length in the Appendix (infra pages ——.)

The court will notice that the Washington Act is very different from the usual State compensation plan. It is exclusively a state insurance system to compensate employees injured in extra-hazardous occupations. It is compulsory. The state collects the insurance fund by means of assessments levied against the employers. The state assumes full responsibility for compensating the injured employees. The entire plan or system is administered by the Department of Labor and Industries of the State. All disputes between employer and the workmen are removed from the field of judicial controversy.

There is no such thing as a private insurance or compensation carrier, nor a self-insuring employer. The injured workman's remedy is solely against the Department of the State, and the only judicial recourse is for a court review of the findings of the Department.

The act provides, however, that if an employer is in default in either reporting his payrolls or making his premium payments to the State Fund, the injured employee may, at his option, sue such defaulting employer for *negligent* injury. Likewise if death results his beneficiaries or dependents may, at their option, maintain an action against the employer in default.

It is under this latter provision that the petitioner here seeks to recover. In her amended complaint she alleges that the decedent, her husband, met his injury and resultant death from an accident sustained while engaged in erecting a travelling crane at the Puget Sound Navy Yard. (Amended Complaint, par. VII, R. 13-14.) It is further alleged that the respondents, as employers, had failed to furnish the State Director of Labor and Industries with an estimate of its payroll, or to furnish monthly payrolls, or to pay premiums thereon, all as required by the Act.

It becomes pertinent, therefore, to inquire if the work in which the decedent was engaged was under the Act. If that Act did not apply, then of course the respondents were not defaulting employers. Unless they are defaulting employers, there is no basis for any action under the terms of the Act.

As an alternative, however, the petitioner claims that if she is not entitled to recover against the respondents as defaulting employers under the Act, she is entitled to recover against the respondents on the ground that the Amended Complaint alleges negligence upon their part in causing injury to, and the consequent death of, her husband. In other words, it is claimed that the Amended Complaint states a good cause of action for wrongful death outside the terms of the Act.

In answer to this contention the respondent points out that under the laws of Washington no action for wrongful death can be maintained except by the *personal representative* of the decedent, and that, therefore, the petitioner, suing in her own name and as guardian *ad litem* for her minor daughter, has no legal capacity to maintain an action for wrongful death.

It is an established fact, that the Puget Sound Navy Yard was acquired prior to the original adoption of the Washington Industrial Insurance Act. (Opinion Supreme Court of Washington, R. 26.) In 1891 the State, by Legislative Act, gave its consent to the acquisition of the Puget Sound Navy Yard and ceded exclusive jurisdiction thereof to the United States of America. (Laws 1891, page 31, Appendix, page

—.) Shortly prior thereto, on August 1, 1882, an Act of Congress was approved authorizing the condemnation of land for sites of public buildings, and for other purposes. (24 U. S. Statutes at Large, p. 357, Chapter 728.)

On March 2, 1891, an Act of Congress was approved making appropriations for the naval service for the fiscal year ending June 30, 1892, and authorized the Secretary of Navy to acquire, for the purpose of a dry dock, a tract of land not exceeding two hundred acres on Puge Sound, Port Orchard, Kitsap County, Washington.

In his annual report for the year 1891, at page 101, the Secretary of the Navy records:

> "Naval Station, Puget Sound, Wash.
>
> "Plans are being prepared for a dry dock at this locality, and as soon as completed and the land acquired, will be advertised.
>
> "Lieut. A. B. Wyckoff was ordered in April to proceed to Seattle, Wash., to acquire a site for this station.
>
> "He has performed this duty most satisfactorily to the Bureau, securing about 140 acres at Port Orchard; a tract of about 40 acres more is in the course of condemnation before the courts to get a clear title."

It is the contention of respondents that the Puget Sound Navy Yard having been acquired long prior

to the enactment of the Industrial Insurance Act,, the State of Washington had no legislative jurisdiction over that area, and that consequently the Act never became effective therein. Furthermore, the position of the respondents is that the Act of Congress dated February 1, 1928 (45 Stat. 54, Title 16 U. S. Code Ann., 1931 Supp. Sec. 457; see Appendix, page —), extending to cases of wrongful death within a National Park or other place subject to the exclusive jurisdiction of the United States such right of action as shall exist under the laws of the state within whose exterior boundaries such place may be, was designed to and does give only such right of action as existed by virtue of the laws of the State of Washington in effect at the time of the death of the decedent Murray herein.

SUMMARY OF POINTS AND AUTHORITIES

I.

THE INDUSTRIAL INSURANCE ACT OF THE STATE OF WASHINGTON NEVER BECAME EFFECTIVE WITHIN THE PUGET SOUND NAVY YARD

A. The Act Expressly Limits Its Application.

> "This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are *within the legislative jurisdiction of the State*, in the following enumeration, and they are intended to be embraced within the term

'extra hazardous' wherever used in this act." (Italics are ours.)

Laws of 1911, Chapter 74, Section 2, page 346; Laws of 1927, Chapter 310, Section 1, page 813.

"It seems to be the purpose of the Act to give the relief therein granted where the legislature had the power to abolish every other remedy."

State ex rel. Jarvis v. Daggett, 87 Wash. 253, 151 Pac. 648.

"This evident spirit of the act, we think, points to a legislative intend to make the act applicable only to those relations of employer and employee which are in the legislative control of the state untrammeled by the laws of the United States and the jurisdiction of the courts of the United States. which might have the effect of rendering the privileges and immunities for which the act provides unequal as between employers or unequal as between employees."

Shaughnessy v. Northland Steamship Co., 94 Wash. 325, 162 Pac. 546.

"The fact that Congress, on October 6, 1917, (Act Oct. 6, 1917, c. 97, par. 1, 2, 40 Stat. 395 (U. S. Comp. St. 1918, par. 991 (3) 1233,) amended (by adding the italicized portion) par. 24 and 256 of the Judicial Code of the United States (Act March 3, 1911, c. 231, 36 U. S. Stat. at Large, 1091, 1160), relating to the jurisdiction of Federal district courts in admiralty, and providing that Federal courts should have jurisdiction 'Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a commonlaw remedy where the common law is competent to give it, and to claimants the rights and remedies under the work-

men's compensation law of any state,' does not change the rule of these cases and extend to the industrial insurance commission jurisdiction of persons engaged in maritime work, for the reason that the workmen's compensation act of this state withdraws all 'remedy of workmen against employers for injuries received in hazardous work from private controversy' and excludes 'every other remedy,' and therefore *the Federal act cannot create a liability where one already exists in admiralty.*" (Italics are ours.)

Puget Sound B. & D. Co. v. Industrial Ins. Com., 105 Wash. 272, 177 Pac. 788.

"The act prior to its amendment vested in the Federal courts jurisdiction over 'all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it.' The amendment added to the saving clause the sentence: 'and to claimants the rights and remedies under the workmen's compensation law of any state.' * * * But it is plain, we think, that our workmen's compensation act does not afford such a remedy. As we held in the case cited, the act was intended to be mutual in its operation, protecting employers of labor in certain enumerated employments, on the one side, from actions in courts of law for personal injuries, and giving to a workman injured while engaged in the numerated employments, on the other, a certain and sure relief for his injury, regardless of the manner in which the injury occurred or to whose fault it might be charged, and was intended to operate only in those instances which are within the exclusive legislative control of the state. It must follow, we think, that the amendment cited has no effect upon the workmen's compensation act of this

state, or the remedies afforded thereby, however effective it may be in other states having a different system for relief in this regard."

Lund v. Griffiths & Sprague Stevedoring Co., 108 Wash. 220, 183 Pac. 123.

See also:

State v. Dawson & Co., 122 Wash. 572, 211 Pac. 724, 212 Pac. 1059, 264 U. S. 219;

McClure v. Wilson, 147 Wash. 119, 265 Pac. 485;

Van Dusen v. Department of Labor and Industries, 158 Wash. 414, 290 Pac. 803.

"The compensation act does not abolish the remedy of the death statute entirely. It abolishes the remedy only in those causes falling within the scope of the act—torts causing injury or death in extra-hazardous occupations *over which the state has sole and exclusive jurisdiction*—not those wherein it does not afford a complete remedy for both the employer and the employee." (Italics are ours.)

Roswall v. Grays Harbor Stevedore Co., 132 Wash. 274, 231 Pac. 934.

B. The Federal Court Is Bound by the Construction Placed Upon the Industrial Insurance Act and the Wrongful Death Statute by the Washington Supreme Court.

"where a state statute has been construed by the highest judicial tribunal of a state, such construction is regarded as a part of the statute and is as binding upon the federal courts as the text of the statutes itself."

25 C. J., Sec. 171, pages 832-833.

"By its literal terms the benefits of the statute are extended to all such surviving relatives, irrespective of their condition. It has, however, been held by the Supreme Court of Pennsylvania, in the case of Deni v. Pennsylvania R. Co., 181 Pa. 525, 59 Am. St. Rep. 676, 37 Atl. 558, as well as in the case at bar, that this statute does not give to relatives of the deceased, who are non-resident aliens, the right of action therein provided for. There is nothing in this case to take it out of the general rule that the construction of a state statute by the highest court of the state must be accepted by this court. It is therefore not material that similar statutes have been differently construed, as, for instance, in Mulhall v. Fallon, 176 Mass. 266, 54 L. R. A. 934, 79 Am. St. Rep. 309, 57 N. E. 386, and Kellyville Coal Co. v. Petraytis, 195 Ill. 217, 88 Am. St. Rep. 191, 63 N. E. 94."

Maiorano v. Baltimore & O. R. Co., 213 U. S. 268 (l. c. 272).

See also:

Detroit v. Osborne, 139 U. S. l. c. 499;

Claiborne County v. Brooks, 111 U. S. 400 (l. c. 410);

Warburton v. White, 176 U. S. 484, 44 L. Ed. 555.

C. **Title to the Puget Sound Navy Yard Having Been Acquired by the United States by Purchase With the Consent of the Legislature of the State of Washington, the Federal Jurisdiction Became Exclusive.**

"To exercise *exclusive* legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular

States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, *Dock-Yards*, and other needful Buildings." (Italics are ours.)

Constitution of the United States, Article 1, Section 8, Clause 17.

By legislative act the State of Washington consented to the acquisition of the Puget Sound Navy Yard and ceded exclusive jurisdicion thereof to the United States of America. (See Appendix, pp. —.)

"When the title is acquired by purchase by consent of the Legislatures of the States, the federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of Congress; and that no other authority can be exercised over them has been the uniform opinion of Federal and State tribunals and the Attorneys General."

Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525.

"(1) The provisions of the Labor Law do not help the plaintiff. They do not help her because they were enacted after the Navy Yard in Brooklyn was ceded to the United States (Laws 1853, c. 355). The common law and statutes passed

before the act of cession remain in force in the ceded territory until displaced by Congress, (Omitting citations), *but later statutes are of no effect. This is now the settled rule.* (Farley v. Schermo, 208 N. Y. 269; Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, 537; W. U. Tel. Co. v. Chiles, 214 U. S. 274.)" (Italics ars ours.)

Kaufman v. Hopper, 115 N. E. 470 (N. Y.).

See also:

Commonwealth v. Clary, 8 Mass. 72;

Concessions Company v. Morris, 109 Wash. 46; 186 Pac. 655;

U. S. of A. v. Unzenta, 281 U. S. 138; 74 L. Ed. 761.

II.

THE PETITIONER HAS NO LEGAL CAPACITY TO SUE

A. Under the Washington Statute Only Personal Representatives of the Deceased Can Maintain an Action for Wrongful Death.

"If it be assumed that the action was brought under state statutes, we are of the opinion that the court's decision was right upon the ground of the incapacity of appellants to bring the action. Section 183, Rem. Comp. Stat., provides that all actions for damages against a person causing the death of another *shall be brought by the personal representative* of the deceased. We have had occasion to construe this statute on many occasions to this effect. Machek v. Seattle, 118 Wash. 42, 203 Pac. 25; Howe v. Whitman County, 120 Wash. 247, 206 Pac. 968; Castner

v. Tacoma Gas & Fuel Co., 123 Wash. 236, 212 Pac. 283."

Broughton v. Oregon-Wash. R. & Nav. Co., 137 Wash. 135, 241 Pac. 963.

See also:

Murray v. Joe Gerrick & Co., 72 Wash. Dec. l. c. 262 (Mar. 24, 1933).

B. The Federal Courts Have Held Similarly Under the Employers' Liability Act.

"We think the objection was interposed in due time and that the state courts erred in overruling it. Two of the plaintiffs, the father and mother, in whose favor there was a separate recovery, are not even beneficiaries under the Federal statute, there being a surviving widow; and she was not entitled to recover in her own name, but only through the deceased's personal representative, as is shown by the terms of the statute and the decisions before cited. See also Tiffany On Death by Wrongful Act, 2d ed. Sections 80, 109, 116."

St. Louis & San Francisco Ry. v. Seale, 229 U. S. 156.

See also:

Reading Company v. Koons, Administratrix, 271 U. S. 58 (1. c. 60);

Pecos & Northern Ry. v. Rosenbloom, 240 U. S. 439.

"To present a valid claim, the representative capacity must be established. Issurance of letters testamentary must be shown, and, if issued in another state, to have extra territorial force, the right must be conferred by statute. The

Washington statute confers no such right, and the state court does not recognize the personal representative of a deceased person from another state."

The Princess Sophia, 35 Fed. (2d) 736; 36 Fed. (2).

C. **The Report of the Senate Judiciary Committee Can Be Considered in Arriving at the Intent of Congress in Adopting the Act of February 1, 1928.**

"Reports of legislative committees. Reports and explanatory statements of legislative committees in charge of a bill, while not binding on the courts in interpreting statutes, may be resorted to as indicative of the intent of the legislature in a case where the meaning of the statute is obscure, or for the purpose of ascertaining the necessity for the enactment, the situation under earlier laws, and the proposed remedy of the new law, but not for the purpose of construing a statute contrary to its plain terms. If the statements made in the reports accord with the reasonable interpretation to be drawn from the language of the act itself, they will be followed."

59 C. J. Sec. 606, pages 1021-1022.

"I concur with these judges in the belief that resort may properly be had to reports of legislative committees for the purpose of ascertaining the occasion and necessity for the enactment, the situation confronting the Congress under the earlier laws, and the proposed remedy of the new law. Park Assessment Co. v. McCaughn (D. C.) 14 Fed. (2d) 553."

American Glue Co. v. United States, 42 Fed. (2d) 235 (1. c. 237).
(Judgment affirmed. 282 U. S. 409, 1. c. 422).

ARGUMENT

I.

THE INDUSTRIAL INSURANCE ACT NOT APPLICABLE

It seems quite clear that the Industrial Insurance Act was never applicable to the work in which the decedent was engaged. The Act expressly recites that it is intended to apply to inherently hazardous works and occupations

"within the legislative jurisdiction of the state."

It is established that the work was being performed within the boundaries of the Puget Sound Navy Yard; that the Industrial Insurance Act was not adopted by the State of Washington until 1911; that the Navy Yard was acquired by the United States Government, with the consent of the State Legislature, long prior to 1911; that from the time of its acquisition under the Constituion it came within the exclusive legislative jurisdiction of Congress.

It is clear, therefore, that the Industrial Insurance Act could have no application to work within the Navy Yard. Such being the case, the employers of the decedent were not within the terms of that Act. Therefore they were not obligated to make payroll reports, nor pay premiums to the State of Washington Not being so obligated they could not be in default for not

having performed those acts. Not being defaulting employers they were not amenable to the provisions of the Industrial Insurance Act relating to liability of defaulting employers to injured workmen.

The futility of the contention raised by the petitioner that the Washington Act applied to the work being performed by decedent, in spite of the express limitations of the Act, and in spite of the construction placed upon the Act by the decisions of the Supreme Court of Washington is further shown by the nature of the Act itself. As pointed out in our Statement, it is a State compulsory insurance Act in which the State creates the fund and pays compensation to injured workmen. The Department charged with the administration of the Act has consistently refused to require payroll reports from, and the payment of premiums by, employers engaged in extra hazardous work within the boundaries of the Navy Yard. Can it be seriously argued that under those conditions the Federal Courts can require the State of Washington, through its Department of Labor and Industries, to levy assessments upon and collect premiums from employers engaged in extra hazardous occupations or works within the Navy Yard? Or can the Federal Courts require the State of Washington, through such Department, to compensate injured workmen? If Federal Courts can hold the terms of the act suffici-

ently applicable to work within the Navy Yard as to fix liability upon the employer as a defaulter under the terms of the Act, then it would certainly seem to have like power to hold the State liable to pay compensation out of the State Fund to the injured employee.

Unless the Federal Courts can find power to enforce this latter obligation, then certainly it must perforce refuse to find the liability contended for by the petitioner.

On this branch of the case we are confident that this Honorable Court must hold that the Industrial Insurance Act of the State of Washington, by virtue of the very limitations contained in the Act itself, and by virtue of the construction which has been put upon the Act by the decisions of the Supreme Court of Washington, never did become effective within the boundaries of the Puget Sound Navy Yard, which was established and came within the exclusive legislative jurisdiction of the United States before the adoption of that Act.

II.

THE STATE DEATH STATUTE OF 1917 GOVERNING

We concede that in all probability the state death statute of 1881 providing

> "When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death," (Section 8, Code of 1881, Section 183, Remington and Ballinger's Annotated Code of Washington).

the adoption of which had preceded the acquisition of the Navy Yard by the United States, remained in effect until the adoption by Congress of the Act of February 1, 1928. (See Appendix, page ---.)

While there has been no judicial construction of this Act of Congress, a reference to the report of the Senate Judiciary Committee seems to indicate quite clearly the purpose of the Act, said report being as follows:

> "The bill (S-1798) * * * was read as follows: (Here the statute is set out.)
>
> "Mr. Robinson of Arkansas: 'I think there should be an explanation of the bill.'
>
> "Mr. Walsh of Montana: 'A similar bill has passed the Senate many times, at least three or four, but for some reason or other it has not succeeded in securing the approbation of the House. It is intended practically to make application of what is known as Lord Campbell's Act to places within the exclusive jurisdiction of the United States.
>
> "Practically every state now has given a right of action to the legal representatives of the dependent relatives of one who has suffered a death

by reason of the neglect or wrongful act of another, there being no such recovery, it will be recalled, at common law.

"There are a great many places in the United States under the exclusive jurisdiction of the United States—the national parks, for instance. If a death should occur within those places, within the exclusive jurisdiction of the United States, there would be no right of recovery on the part of the representatives or dependents of the person who thus suffered death as a result of the wrongful act or neglect of another.

"In the State of the Senator I suppose a right of action is given by the act of the Legislature of the State of Arkansas to the representatives of one who thus suffers, but if the death occur within the Hot Springs Reservation, being entirely within the jurisdiction of the United States, no recovery could be had, because recovery can be had there only by virtue of the laws of Congress. The same applies to the Yellowstone National Park in Wyoming and the Glacier National Park in Montana."

Congressional Record, Volume 69, page 1486.

The clear intent to be gathered from the terms of Act itself, as well as the report of the Judiciary Committee seems to be to make effective and applicable to any instance of wrongful death occurring within the boundaries of those places subject to the exclusive legislative jurisdiction of Congress the then existing wrongful death statute of the State within whose exterior boundaries such place is located. In other words, the legal action or remedy given by this Act of

Congress of February 1, 1928, is such action or remedy as is effective within the State *at the time the wrongful death occurs.* In 1917 the State of Washington repealed the wrongful death statute of 1881, and substituted in lieu thereof a new death statute giving a right of action for the benefit of certain heirs and dependents of the decedent, but expressly providing that such action could be maintained only by *the personal representative of the decedent.* This 1917 statute was in effect within the State of Washington at the time the petitioner's decedent met his death.

Therefore, under the terms of the Act of Congress of February 1, 1928, the personal representative of the decedent, Murray, was the only one authorized by the laws of the State of Washington to maintain an action for his alleged wrongful death. This is the remedy, and the only remedy, which is authorized under the terms of the Federal Act.

Timely steps were taken, both by motion and by demurrer, to question the legal capacity of the petitioner herein to sue in her own right and as guardian *ad litem* for her minor child. These challenges were sustained by both the trial court and the Supreme Court of the State. Their decisions were based upon established and prior holdings construing the 1917 death statute. The Federal Court is bound by the

decisions of the Supreme Court of the State of Washington.

The case before the court is to be distinguished from such case as *Missouri K. & T. Ry. Co. v. Wulf*, 192 Fed. 919, 226 U. S. 570-578, cited by the petitioner, in that no timely objection was made by the defendant. Neither has any application ever been made by the petitioner to have herself, as administratrix of the estate of her deceased husband, substituted as plaintiff in the action, as seems to be intimated on page 13 of petitioner's petition and brief. The opinion of the Supreme Court expressly states:

> "Cases holding to the effect that the objection that the action is not brought in the name of the proper party must be timely made are of no controlling importance here, because in this case the respondents raised the question upon their first appearance and continued to insist upon it."
>
> *Maxine Murray On Her Own Behalf and As Guardian Ad Litem of Maxine Lois Murray, a Minor, appellant, v. Joe Gerrick & Company, et al., respondents*, 72 Wash. Dec. 257, R. 25-30.

Not only is the record barren of any application on the part of the petitioner to appear in a representative capacity, but it affirmatively appears also that the petitioner was, at all times, insisting upon her right to maintain the action in her personal and individual

capacity. To the original complaint the respondents demurred, setting forth as one ground of demurrer that

> "neither of the plaintiffs has any legal capacity to sue." (R. 8.)

After this demurrer had been sustained, and the plaintiff had filed her amended complaint again alleging her right to sue in a personal capacity, the respondents renewed, by demurrer, the same objection. (R. 19-20.) This contention was sustained by the trial court in his memorandum opinion (R. 21, 22). The trial court was affirmed in the opinion of the Supreme Court. (R. 29, 30.)

The Washington decisions heretofore cited have definitely construed the Washington death statute as requiring the action to be brought by the *personal representative only*. This construction the Federal Court will accept. Furthermore, the construction is in accordance with the prior decisions of this Honorable Court under the Federal Employers' Liability Act which have been heretofore cited.

The respondents therefore stand upon the two positions which they have taken heretofore, that the amended complaint failed in two respects:

1. That it showed conclusively that the Industrial Insurance Act of the State of Washington did not ap-

ply to the work which the decedent was doing, and that therefore no right could accrue to the petitioner under that act; and

2. That no action can be maintained for wrongful death outside of the Industrial Insurance Act except by the personal representative of the decedent.

It seems to us that the Supreme Court of the State of Washington was correct in its judgment, and that the writ of certiorari must fail.

Respectfully submitted,

STEPHEN V. CAREY,

Attorney for Joe Gerrick & Company and F. W. Corning, Respondents,

J. SPEED SMITH & HENRY ELLIOTT, JR.,

Attorneys for Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation and Max Bloomenstein, Respondents.

APPENDIX

PERTINENT PROVISIONS OF WASHINGTON INDUSTRIAL INSURANCE ACT

"7673. Declaration of police power. * * * The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Section 7673 Rem. Rev. Stat. of Washington; Laws of 1911, Chapter 74, Section 1, page 345.

"7674. Extrahazardous employment. There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within *the legislative jurisdiction of the state*, in the following enumeration, and they are intended to be embraced within the term 'extrahazardous' whenever used in this act, to-wit: * * *"

Section 7674, Rem. Rev. Stat. of Washington; Laws of 1927, Section 1, page 813, Cf. Laws of 1911, Chapter 74, page 346, Section 2.

"7676. Schedule of contribution—Pay-rolls—Record of Employment—Penalties—Funds, now kept—Premium deductions prohibited—procedure. Inasmuch as industry should bear the greater portion of the burden of the cost of its accidents, each employer shall prior to the fifteenth day of February, 1932, and prior to the fifteenth day of each month thereafter, pay into the state treasury (1) for the accident fund, a sum equal to a percentage of his total payroll for the preceding calendar month, and (2) for the medical aid fund a certain number of cents for each day worked by workmen, all while engaged in extra-hazardous employment. * * *

"Every employer who shall enter into any business, or who shall resume operations in any work or plant after the final adjustment of his payroll in connection therewith, shall, before so commencing or resuming operations, as the case may be, notify the director of labor and industries of such fact, accompanying such notification with an estimate of his payroll for the first calendar month of his proposed operations, and shall make payment of the premium on such estimated payroll. Every such employer shall be liable for a premium of at least such estimated payroll. * * *

"Every employer who shall fail to furnish an estimated payroll and make payments as above provided shall be liable to a penalty of not to exceed five hundred dollars ($500.00) and shall also be liable if an accident has been sustained by an employee prior to the time such estimate is received by the department, to a penalty in a sum equal to fifty per cent of the cost to the accident fund and medical aid fund of such accident, to be collected in a civil action in the name of the state, and paid into the accident fund. The director of labor and industries may waive the

whole or any part of any penalty charged under this act. In respect to any injury happening to any of his workmen during the period such employer shall be in default in the payment of any premium, if such default be after demand for payment; or if such employer shall be in default for failure to furnish the department with an estimated payroll or with monthly reports of his payroll as required by this section, the defaulting employer shall not be entitled to the benefits of this act, but shall be liable to suit by the injured workman (or his beneficiaries and dependents), at his or their option, as he would have been on March 14, 1911, and in any action brought against such employer, it shall be no defense for such employer to show that such injury was caused in whole or in part by the negligence of a fellow servant of the injured workman, that the negligence of the injured workman, other than his wilful act committed for the purpose of sustaining the injury, contributed to the accident, or that the injured workman had knowledge of the danger or assumed the risk which resulted in his injury. If such injured workman or his beneficiaries, or dependents, shall elect to take under this act, such action against the employer shall revert to the state for the benefit of the accident fund."

Section 7676, Rem. Rev. Stat. of Washington; Laws of 1931, Section 1, page 297; Cf. Laws of 1911, Section 4, page 349.

"7679. Schedule of awards. Each workman who shall be injured in the course of his employment, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment shall be in

lieu of any and all rights of action whatsoever against any person whomsoever. * * *"

Section 7679, Rem. Rev. Stat. of Washington; Laws of 1929, Section 2, page 329; Cf. Laws of 1911, Section 5, page 356.

STATE OF WASHINGTON WRONGFUL DEATH STATUTE OF 1917

"183. Right of action for wrongful death. When the death of a person is caused by the wrongful act, neglect or default of another, his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony."

Section 183, Rem. Rev. Stat. of Washington; Laws of 1917, Section 1, page 495; Cf. Laws of 1854, Sec. 496, page 220.

"183-1. Beneficiaries of action for wrongful death. Every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused. If there be no wife or husband or child or children, such action may be maintained for the benefit of the parents, sisters or minor brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death. In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just."

Section 183-1, Rem. Rev. Stat. of Washington; Laws of 1917, Section 2, page 495.

ACT OF CONGRESS DATED February 1, 1928, EXTENDING STATE REMEDY FOR WRONGFUL DEATH TO NATIONAL PARKS AND OTHER PLACES UNDER THE EXCLUSIVE JURISDICTION OF THE UNITED STATES WITHIN THE TERRITORIAL BOUNDARIES OF SUCH STATE.

"Action for death or personal injury within national park or other place under jurisdiction of United States; application of State Laws. In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the States within the exterior boundaries of which it may be."

(Feb. 1, 1928, c. 15, 45, Stat. 54; Section 457, Title 16, U S. C. A.).

State Statute Consenting to United States Acquiring Ownership and Jurisdiction of State Lands

"8108. Consent to acquisition of certain rights by United States, etc. The consent of the State of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same. of any tract, piece, or parcel of land, from any individual or individuals,

bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of congress, and all deeds, conveyances of title papers for the same shall be recorded as in other cases, upon the land records of the county in which the land so acquired may lie; and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or tracts, legal divisions or subdivisions of any public land belonging to the United States, which may be set apart by the general government for any or either of the purposes before mentioned by an order, patent, or other official document or papers describing such lands; the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the Consitution of the United States, and with the acts of congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such

tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted."

Section 8108 Rem. Rev. Stats.; Laws 1891, page 31.

CORRECTED COPY

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SUPREME COURT OF THE UNITED STATES.

No. 308.—October Term, 1933.

Maxine Murray, on her own behalf and as guardian *ad litem* of Maxine Lois Murray, a minor, Petitioner,
vs.
Joe Gerrick & Company, Industrial Brown Hoist Corporation, et als.

On Writ of Certiorari to the Supreme Court of the State of Washington.

[February 5, 1934.]

Mr. Justice Roberts delivered the opinion of the Court.

Louis H. Murray, a steel erector, died as the result of a fall from a crane which was being erected by his employers, the respondents, in the Puget Sound Navy Yard at Bremerton, Washington. The petitioner, his widow, brought action, on her own and her minor child's behalf, alleging the decedent's death was caused by the respondents' negligence. The trial court sustained a demurrer to the declaration, holding the action was not maintainable by the widow and daughter as beneficiaries under the Washington Workmen's Compensation Act, since that act was not in force in the Navy Yard; and if it were considered a suit for death by wrongful act, the applicable state statute required that it be instituted by the personal representative of the decedent. The petitioner, although she was also administratrix, refused to amend and claim in virtue of her status as such, and stood upon the declaration. A judgment in favor of respondents was affirmed by the Supreme Court.[1]

In the petition for certiorari it is asserted that the state courts misconstrued the Act of Congress of February 1, 1928. This court consequently has jurisdiction. The question of the bearing of the federal Act upon the right to maintain the action requires the statement of additional facts.

By a statute passed in 1891[2] the State consented to the acquisi-

[1] 172 Wash. 365; 20 Pac. (2d) 591.

[2] Laws of 1891, p. 31; Remington's Revised Statutes, § 8108.

tion of a tract of land by the United States for a navy yard or other specified uses, and ceded jurisdiction over the same to the federal government, retaining only concurrent jurisdiction for the service of civil and criminal process issued under the authority of the State. Pursuant to this consent, the United States acquired what is now known as Puget Sound Navy Yard. At that time a state statute was in force permitting the heirs or personal representatives of one dying as a result of negligence to maintain suit against the wrongdoer.[3]

In 1911 Washington adopted an industrial insurance law or workmen's compensation act which required every employer engaged in extrahazardous occupation to report the work undertaken by him and to pay to a state insurance fund certain sums measured by the payroll for the work. The act abolished all actions by employees against employers for injury in extrahazardous occupations, and, in lieu thereof, conferred upon the injured workman the right to be paid from the fund; gave a similar right to named beneficiaries in case of an employee's death, and further provided that if an employer should fail to report or to pay to the state fund, the employee, or his beneficiaries in case of death, might sue the employer for negligence.[4]

In 1917 the prior statute relating to suits for death by wrongful act was superseded by an act vesting the right to sue in the personal representatives of the decedent.[5]

February 1, 1928, an Act of Congress[6] became effective entitled "An Act Concerning actions on account of death or personal injury within places under the exclusive jurisdiction of the United States." It enacts: "In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State . . . ; and in any action brought to recover on account of injuries sustained in any such place the rights of the

[3] § 8, Code of 1881; Remington & Ballinger's Ann. Code, § 183.

[4] Remington's Revised Statutes, §§ 7673, 7674, 7676, 7679.

[5] Remington's Revised Statutes, §§ 183, 183-1.

[6] Act of February 1, 1928, c. 15, 45 Stat. 54; U. S. Code Title 16, § 457.

parties shall be governed by the laws of the State within the exterior boundaries of which it may be."

The petitioner, believing this Act of Congress made the state compensation law applicable to the Navy Yard, sued on behalf of her child and herself as beneficiaries, alleging the respondents had failed to report the work and make the payments required by the compensation act.

The state Supreme Court held that the compensation act does not apply to territory beyond the authority of the state legislature. But it also held that act could not have any force in the Navy Yard, since it was adopted many years after the cession of jurisdiction by the State and the consequent acquisition of the tract by the United States. In this the court was clearly right. After the effective date of the State's cession the jurisdiction of the federal government was exclusive (*Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525, 537; *United States* v. *Unzeuta*, 281 U. S. 138), and laws subsequently enacted by the state were ineffective in the Navy Yard. *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439. Congress may, however, adopt such later state legislation as respects territory under its jurisdiction, and the petitioner claims it did so adopt the compensation act by the Act of February 1, 1928. This argument overlooks the fact that the federal statute referred only to actions at law, whereas the state act abolished all actions at law for negligence and substituted a system by which employers contribute to a fund to which injured workmen must look for compensation. The right of action given upon default of the employer in respect of his obligation to contribute to the fund is conferred as a part of the scheme of state insurance and not otherwise. The Act of Congress vested in Murray no right to sue the respondents, had he survived his injury. Nor did it authorize the State of Washington to collect assessments for its state fund from an employer conducting work in the Navy Yard. If it were held that beneficiaries may sue, pursuant to the compensation law, we should have the incongruous situation that this law is in part effective and in part ineffective within the area under the jurisdiction of the federal government. Congress did not intend such a result. On the contrary, the purpose was only to authorize suits under a state statute abolishing the common law rule that the death of the injured person abates the action for negligence.

The petitioner urges that if the Act of Congress failed to extend the workmen's compensation law to the Navy Yard, she is, nevertheless, entitled to maintain her action in behalf of herself and her child as heirs of the decedent, because the ~~Act~~ Code of 1881 (*supra*) was in effect at the date of cession and remained applicable until Congress altered it. She relies upon the principle that when political jurisdiction and legislative power over territory are transferred from one sovereign to another, the municipal law of the place continues in force until abrogated by the new sovereign. *Chicago Rock Island & Pacific Railway Co.* v. *McGlinn*, 114 U. S. 542; *Vilas* v. *Manila*, 220 U. S. 345, 357. But the weakness of her position is that by the Act of February 1, 1928, Congress did abrogate the ~~Act of 1881~~ Code provision as respects the Navy Yard by enacting that "such right of action shall exist as though the place were under the jurisdiction of the State", and "in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be." This plainly means the existing law, as declared from time to time by the state; and Washington, by the Act of 1917, has substituted for the action, given in the alternative to heirs or personal representatives by the ~~Act~~ Code of 1881, one vested exclusively in the personal representative. It results that the petitioner could sue only under the Act of 1917.

The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.